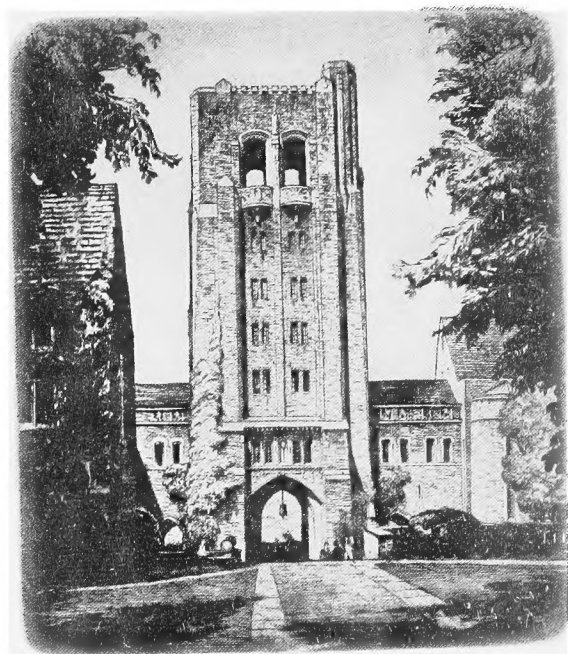


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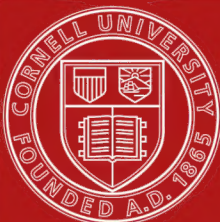
A treatise on the law of benefit societies



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A TREATISE ON THE LAW
OF
BENEFIT SOCIETIES
AND
LIFE INSURANCE.

VOLUNTARY ASSOCIATIONS, REGULAR LIFE, BENEFICIARY
AND ACCIDENT INSURANCE.

BY
FREDERICK H. BACON,
Of the St. Louis Bar.

THIRD EDITION.

VOL. II.

ST. LOUIS:
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THESE VOLUMES ARE INSCRIBED,
IN COMMEMORATION OF A FRIENDSHIP OF NEARLY THIRTY YEARS,
TO
JOHN E. McKEIGHAN
OF ST. LOUIS;
AN ABLE AND LEARNED LAWYER, A TRUSTED AND HONORED CITIZEN,
"INTEGER VITAE, SCELERISQUE PURUS."

F. H. B.

PREFACE TO THIRD EDITION.

Ten years have passed since the publication of the second edition of this work. During this period more than three thousand cases, relating to principles herein considered, have been decided by appellate courts. These adjudications have not so much changed the law as they have added to it. It was necessary, therefore, that a new edition be prepared, incorporating all these cases. This has been done to the best of the ability of the author, who has given much time and thought to the work.

Where new features have been considered, free quotations have been made from the opinions, on the same general plan of previous editions, which seems to have met with the favor of the profession. An effort has been made to make all references accurate, having alone in view the practical use of the book by active practitioners. A large number of new sections have been added which have made clearer many of the principles of this branch of the law.

In addition to the law of voluntary and fraternal beneficiary associations the subjects of regular life and accident insurance have been carefully and exhaustively reviewed in all particulars, even more so than in former editions, so that in this respect the work will, it is believed, be found satisfactory.

The author is grateful for the kind appreciation his work has received from bench and bar, and trusts that this new edition will meet with continued confidence and favor.

FREDERICK H. BACON.

ST. LOUIS, October, 1904.

PREFACE TO SECOND EDITION.

When the first edition of this work appeared the law of beneficiary insurance was in its infancy. During the six years that have elapsed since its publication numerous new decisions have been rendered, sometimes modifying or changing, but more frequently adding to, the principles there laid down. The importance of these new cases, as well in regard to life insurance proper, as beneficiary indemnity, or questions arising in cases involving the acts of voluntary associations, or clubs, imperatively demanded their incorporation in a new edition.

The text has therefore been carefully revised incorporating all the cases bearing on the subjects herein treated of up to October 1st, 1894. In this work of revision five hundred pages of new matter and twelve hundred cases not cited in the first edition have been added.

A chapter on accident insurance in all its phases has been included, as that branch of business has increased enormously during the last ten years.

The subject of regular life insurance was fully treated in the first edition and is now still more carefully and thoroughly considered. It is believed that all the cases on this subject decided by courts of last resort have been cited.

In the revision the plan of quoting liberally from the opinions of the courts has been adhered to, because in this way the reasons for conclusions are shown, and the work

PREFACE TO SECOND EDITION.

gains an added value to those who either have not access to full law libraries, or wish to be relieved from the necessity of consulting the authorities cited. The conscientious effort has been made to be fair in all respects, giving the law as it is found in the adjudications of the courts, and to avoid, as far as possible, the expression of personal views. If the question has been decided differently by different courts the reasoning on both sides has been given, leaving the reader to decide which is most sound.

The author desires to express his gratitude for the flattering and generous reception given his work by the profession and the many kind words spoken in its behalf. He hopes that the new edition will merit continued favor and success.

FREDERICK H. BACON.

ST. LOUIS, October, 1894.

PREFACE TO FIRST EDITION.

The secret benevolent and beneficiary orders, or beneficiary societies, which are both social clubs and life insurance companies, have multiplied amazingly during the last twenty years. Branches of these organizations are now found in nearly every village in the land and in the larger cities lodges are numbered by scores and even hundreds. They have characteristics in common with ordinary clubs and the familiar fraternities, the Masons and Odd-Fellows.

The litigation connected with these societies is novel and important. It embraces two classes of cases; the first involving the discipline of members and their personal liability for the community debts; the second includes the still more important questions relating to the rights of beneficiaries, the decision of which often requires an application of the principles of the law of life insurance. The numerous cases, decided during the last ten years, by the courts of last resort of the several States and the Federal courts, are not collected or discussed in any legal text-book, consequently they are unfamiliar to most lawyers, who do not realize their extent and value.

Cases that have arisen in my own practice have convinced me of the need of a treatise on the subject, one in which the rights and liabilities of members of the beneficiary orders and of their beneficiaries should be considered in close connection with the law of life insurance proper. This need I have tried to supply. The work covers the entire subject of life insurance and includes all cases decided up to date.

PREFACE TO FIRST EDITION.

The extent to which I have succeeded must be determined by the profession. Although I make public the results of my labors with diffidence, I am content to do so without apology other than this brief explanation. My work must speak for itself — its value must be measured by the merit its use may develop, its faults could not be lessened or excused by anything I here might say.

I have generally cited the cases, in addition to a reference to the regular reports, by the volume or page of the *American Decisions*, *American Reports* and the *National and Co-operative Systems of Reporters*, if re-reported. I have not, however, given all of these references each time the case is referred to. The full citations may be found by consulting the table of cases which precedes the text.

I wish to here acknowledge my obligations to P. Wm. Provenchere, Esq., of the St. Louis bar, who carefully read the work in manuscript and materially aided me with valuable suggestions.

FREDERICK H. BACON.

ST. LOUIS, October, 1888.

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§ 320. **Liability of Insurer under an Insurance Contract may be Conditional.** — In entering into a contract of life insurance it is lawful and usual for the parties to agree upon the terms and qualify the liability with whatever

restrictions or conditions they see fit. If these conditions and provisions are not against the policy of the law they will be valid. There may be various qualifications of the liability on the part of the insurance company; such as the prompt payment of premiums, the observance of certain rules as to residence, habits, etc., and a total exemption from liability if death results from certain causes or occurs under specified circumstances.

§ 321. **Contracts of Benefit Societies and Ordinary Life Insurance Companies Contrasted.**—In ordinary life insurance contracts the policy, or the application, medical examination and other certificates, if such be aptly referred to, in connection with the policy, contain the entire agreement of the parties. Generally speaking the liability of the insurer will not be affected by anything not contained in this contract — the latter is supposed to speak for itself and is to be construed like other contracts; it should be certain and definite so that from the first the assured and insurer may read and know its terms and conditions. With the obligations of benefit societies and their members the case may be somewhat different. It is competent, within certain bounds and by mutual consent, for other conditions or terms to be added to the contract. The member, in becoming such, usually agrees to be bound by laws subsequently enacted, as well as those in force at the time of his joining the society, and thus, in one sense, the contract is uncertain until the liability is determined by the death of the member. We have already discussed the obligation of subsequently enacted laws¹ and have seen that the chief difference between the ordinary contracts of life insurance companies and those usual in benefit societies is that in the former the policy, and documents referred to in it, contain

¹ *Ante*, § 185.

the agreement, while in the latter the certificate and application, together with the charter and by-laws, are to be looked to for the contract.¹ There is no reason, however, why there should be any distinctions in the application of the law regarding conditions and the terms of the contracts of insurance companies proper and those of mutual benefit societies. In either case the object is to ascertain the intent of the parties and enforce the liability accordingly, unless something in statute or common law forbids.

§ 322. **Scope of this Chapter.** — We have already considered the subjects of warranty and representation and general construction of the contract. Reserving for future discussion the matters of premium, or assessments and dues, and forfeiture for their non-payment, we shall review some of the other conditions generally found in life insurance contracts, the observance of which are necessary, if liability for the loss is to attach. By some of these conditions, usual in life insurance policies, but not so common in the case of the obligations of benefit societies, certain restrictions upon residence, travel, habits and occupation are imposed, and by others the contract is made void if death results from suicide, intemperance or violation of law. It may be possible that the law would imply some of these conditions, but this is disputed. As liability under a policy of fire insurance would be avoided if the assured should himself burn his property, so it is probable that an insurer would not be responsible if the assured should feloniously take the life of the insured, or if the insured knowingly, designedly and understandingly killed himself.²

¹ *Holland v. Taylor*, 111 Ind. 121; *Hellenberg v. District No. 1*, I. O. O. B., 94 N. Y. 580; *Kentucky Mut. Ins. Co. v. Miller*, 13 Bush, 489; *ante*, § 161.

² *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139; 18 Sup. Ct. Repr. 300; *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436.

Nor need we at this time, either, consider the provisions of the contract as to the proceedings after the loss has occurred, which properly belong to another division of the subject.

§ 323. **Condition as to Future Conduct, when Binding.** — It is competent for the assured to warrant that he will or will not do certain things, and the word “guarantee” has been held to be equivalent to warrant.¹ But a stipulation, in order to amount to a warranty, must be in some way incorporated into the policy.² And the language must be clear for such a provision will be strictly construed.³ The company is not obliged to tender back the premiums where the policy has become void because of a breach of a promissory warranty.⁴ A covenant that the assured will not practice “any pernicious habit” is not ambiguous so that parol evidence is admissible to show what interpretation the agent put upon it.⁵ It is difficult to distinguish any difference between promissory warranties and promissory representations, unless it be that the former must be strictly complied with and the latter only substantially carried out. If there is any difference it is one of degree. “A promissory representation,” says Judge Gray,⁶ “may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part

¹ *Knight v. Mut. Life Ins. Co.*, 14 Phila. 187; affirmed 9 W. N. C. 501.

² *Presb. Ass. Fund v. Allen*, 106 Ind. 593; *Cushman v. U. S. Life Ins. Co.*, 63 N. Y. 404; *J. ffries v. Union Mut. L. Ins. Co.*, 1 McCrary, 114; 1 Fed. Rep. 450; 22 Wall. 47; *ante*, § 208.

³ *Janneck v. Metropolitan Life Ins. Co.*, 162 N. Y. 574; 57 N. E. R. 182; affg. 43 N. Y. Supp. 669. See also *post*, §§ 325 and 326.

⁴ *U. S. Life Ins. Co. v. Smith*, 34 C. C. A. 506; 92 Fed. R. 503; *Dickerson v. N. W. Mut. L. Ins. Co.*, 200 Ill. 270; 65 N. E. R. 694; affg. 102 Ill. App. 280.

⁵ *Masons' Union, etc. v. Brockman*, 20 Ind. 206; 50 N. E. R. 493.

⁶ *Kimball v. Aetna F. Ins. Co.*, 9 Allen, 543.

thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written, for if it does not exist there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract." In *Prudential Insurance Co. v. Aetna Life Ins. Co.*,¹ it was said: "The insurer is at liberty to compel an observance of promises in regard to future conduct, by incorporating them into the written contract, if it regards a performance as important, but the promise, unless embodied in the contract, is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends must appear in the agreement." There is a difference of opinion as to what language will constitute a promissory warranty. In one case² the Supreme Court of Pennsylvania held that by "declaring" that he would not do certain things the insured did not "warrant" that he would not. The United States Circuit

¹ U. S. Cir. Ct. Conn., 52 Conn. 576; 23 Blatchf. 223; 23 Fed. Rep. 438.

² Citing *Alston v. Mechanics' Ins. Co.*, 4 Hill, 329; *Mayor, etc. v. Brooklyn Ins. Co.*, 4 Keyes, 465; *Bryant v. Ocean Ins. Co.*, 22 Pick. 200; *Ins. Co. v. Mowry*, 96 U. S. 544.

³ *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118.

Court, upon similar facts, held the reverse.¹ In a case decided by the Supreme Court of California,² the facts were these: The member of a temperance order agreed in his application "that a compliance with all the laws, regulations and requirements which now or hereafter may be enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system," and the certificate contained a clause that it was issued upon the express condition that the member "shall in every particular, while a member of our said order, comply with all the laws, rules and requirements thereof." After becoming a member the assured began to drink intoxicating liquors and his death was hastened by such use of liquor. At the time of his death all his dues and assessments were paid up, and afterwards the beneficiary named in the certificate brought suit against the order for the benefit. The defense was the violation of the condition as to the use of liquor. The remaining facts are stated by the court in its opinion as follows: "The controlling and distinguishing feature of this order is its requirement of daily abstinence from the use of liquor as a beverage by its members. It is the fundamental principle in every degree. In order to become a member of the order, or entitled to a beneficiary certificate, the applicant was required to take all the degrees, and to pledge himself upon taking each one, that so long as he was a member of the order he would wholly abstain from the use of all alcoholic liquors as a beverage. Violations of this pledge were punished by sus-

¹ *Schultz v. Mut. Life Ins. Co.*, 6 Fed. 672.

² *Hogins v. Sup. Counc. Champions of the Red Cross*, 76 Cal. 109; 18 Pac. Rep. 125. To the same effect are: *Sup. Counc. Royal Templars of Temperance v. Curd*, 111 Ill. 284; *Smith v. Knights of Father Matthew*, etc., 36 Mo. App. 184; *State v. Temperance, etc., Soc.*, 42 Mo. App. 485. See in regard to promissory representations in accident insurance, *post*, § 491, *et seq.*

pension. The system of insurance is clearly intended to be confined exclusively to temperance people. The applicant Hogins so understood it. In his application he expressly agreed that he should not be entitled to the benefits of the system unless he complied with all the laws, regulations and requirements of the order. The clause quoted from the certificate does not, perhaps, literally express the meaning intended, but it is quite clear what was meant and intended by the parties. It does not say that payment is contingent upon the express condition, but such was clearly the intent. Appellant claims that the condition is for the issuance merely, but the conditions are in their nature matters to occur in the future. 'That said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules and requirements thereof,' shows beyond controversy that his conduct after the issuance of the certificate was to be the condition of payment. His application shows clearly that such was his intention and contract, and we think that the application and the certificate may be read together for the purpose of showing that the clause in the certificate is an express condition precedent to the payment of the insurance. * * * We do not think that suspension or expulsion was necessary by the order to forfeit the policy." In another case¹ the court said: "It seems clear that effect must be given to the plain terms of the insurance contract, that proof of a violation of its provisions is a defense to any action to recover thereon. Such provision is as clearly self-executing as are those frequently met with which provide that if a member fails to pay any assessment upon his membership, made in accordance with the insurance contract, he shall

¹ *Langnecker v. Trustees Grand Lodge, etc.*, 111 Wis. 279; 87 N. W. R. 293; 55 L. R. A. 185. See also *Moerschbaeher v. Supreme Council R. L.*, 188 Ill. 9; 59 N. E. R. 17; 52 L. R. A. 281; *National Masonic, etc., Soc. v. Seed*, 95 Ill. App. 43.

from the time of such failure stand suspended and no longer a member of the order. The one says compliance with all the laws, rules and regulations of the order is a condition precedent to any liability thereon; the other that payment of dues according to the contract is a condition precedent to the continuance of the membership. No suggestion has been made which from any standpoint reasonably supports a contrary view to that above expressed, except that the law adopted by appellant merely required the expulsion of members as a penalty for entering into the business of selling intoxicating liquor as a beverage, and need not necessarily be construed as prohibiting members from entering into such business, and that therefore the promise of Richter, that he would obey all the laws, rules and requirements of the order as a condition precedent to liability to his beneficiary, does not necessarily include a promise not to enter into the business mentioned in the law. We are not inclined to treat that suggestion as unworthy of consideration. The by-law did not expressly prohibit members from entering into the business of vending intoxicating liquors. However, it seems that no more strict rules of construction should be applied to it than are ordinarily applied to penal statutes, and we may venture safely to say that such statutes are generally held by necessary implication to prohibit those things that are made punishable by them; that such implied prohibition exists in all cases where the purpose of the law is to make the act punishable against which it is directed."

§ 324. **Restrictions on Travel or Residence.** — It is usual in life insurance policies for restrictions to be imposed upon the insured in regard to travel or residence beyond certain limits. Such provisions are to have a reasonable construction. In a case involving a clause of this

kind,¹ the court said: "The meaning, therefore, is that if the assured shall pass beyond or be without the regions in which residence is permitted, except to go, as a passenger, by the usual lines of conveyance between ports or places within those regions, the policy shall be void; and perhaps it is to be inferred, though it is not explicitly stated, that if he shall be in a specified region of residence, but at a time when residence there is not permitted, except it be to 'pass, as a passenger,' upon a usual route of travel, the policy shall become void. If any such inference against the assured is allowable, that would seem to be the utmost scope of it. It was, therefore, a violation of no condition of the policy that the assured went from Long Beach to New Orleans, and back to Long Beach again, on the 31st day of July, 1894, nor that, on arrival at New Orleans on August 6th, he was compelled to interrupt his journey homeward, and go to the house of a friend to die, unless, according to the fair meaning of the policy, construed liberally in favor of the assured, he by so stopping ceased to be a passenger and became a resident. As already indicated, our opinion is that, to be a passenger or traveler on a journey, by a route of public conveyance, one need not be on the constant go. He may not stay on his way so long, and under such circumstances, as to become a sojourner; but he has the right to stop, as a passenger or traveler is to be expected to do, for any purpose of business, health, or pleasure, and especially when sickness makes it necessary. Whether, in this instance, the interruption of the journey was improper, was, in the view most favorable to the defendant in error, a question of fact, or of mixed law and fact, to be submitted to the jury upon proper instructions." In these cases, while the condition

¹ *Converse v. Knights Templars, etc., Co.*, 35 C. C. A. 232; 60 U. S. App. 288; 93 Fed. Rep. 148.

must be kept, it is competent for the insurer expressly, as by a permit, or impliedly, as by receiving a premium with knowledge of the violation¹ to waive the forfeiture. In the case of implied waiver it is immaterial whether the knowledge be actual or constructive,² but, if the knowledge be received through an agent who, under the contract, has no right to waive forfeitures, there will be no constructive knowledge of the insurer³ unless the insured be misled to his prejudice. If a permit be granted it will be construed most strongly against the company.⁴ If the language used is clear and unambiguous it must be strictly followed, although the deviation be to the advantage of the insurer,⁵ and the waiver is only for the time named and after its expiration the conditions of the policy remain in force.⁶ The indorsement of a permit to enjoy privileges which the insurer had under the original contract will not affect or restrict such rights;⁷ but if such indorsement be made at the time the policy is issued it is to be deemed part of the contract.⁸ A permit, however, is a separate and independent agreement.⁹ In construing policies the term, "settled limits" of the United States, means the

¹ *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn. 244. See also *Mutual Ben. L. Ins. Co. v. Martin*, 108 Ky. 11; 55 S. W. R. 694.

² *Wing v. Harvey*, 5 De G., M. & G. 265; 27 E. L. & Eq. 140; *Garber v. Globe, etc., Ins. Co.*, 5 Big. L. & A. Ins. Cas. 221; *Girdlestone v. N. B. Mar. Ins. Co.*, 11 L. R. Eq. Cas. 197.

³ *Lorie v. Conn. M. L. Ins. Co.*, 5 Big. Life & Acc. Ins. Cas. 233.

⁴ *Taylor v. Ætna Ins. Co.*, 13 Gray, 434; *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 476; *Pohalaski v. Mut. L. Ins. Co.*, 56 N. Y. 640; 45 How. Pr. 504.

⁵ *Hathaway v. Trenton Mut. L. Ins. Co.*, 11 Cush. 448; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Raynsford v. Royal Ins. Co.*, 52 N. Y. 626.

⁶ *Ayer v. N. E. Mut. L. Ins. Co.*, 109 Mass. 430.

⁷ *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249.

⁸ *Raynsford v. Royal Ins. Co.*, 52 N. Y. 526; 1 J. & S. 453.

⁹ *Ibid.*

established boundaries of the Union.¹ Whether when, under a permit, the assured has gone into a region forbidden by the policy and is there taken sick so that he cannot return within the specified time, the policy is forfeited under the condition, is doubtful. In one case² the insured was restricted from being in certain territory after a specified date. About a month before the latter date he, being in such territory, was taken sick and, being too ill to travel, remained where he was until after the limit of time expired, when he died. The court held that the sickness was an act of God which saved the condition. In a later case in the same State,³ it was held that, if a person, already in feeble health, goes beyond the restricted limits and remains there until he is too feeble to return, the impossibility of return cannot be alleged as an excuse for violating the condition, for the insured took the chances.⁴ The court says:⁵ "The policy contained a provision that it should be void, null, and of no effect, in case Starr, whose life was insured, should, between the first day of July and the first day of November in any year visit any part of the United States lying south of the southern boundaries of Virginia and Kentucky, without the written consent of the company. In November, 1869, he went to Louisiana and remained there until he died, on the 18th day of March, 1872. The defendant alleged this as a breach of the policy and refused payment upon this ground. He had the written permit of the de-

¹ *Casler v. Conn. Mut. L. Ins. Co.*, 22 N. Y. 427. But in this case part of the court dissented. Every year, however, this question is assuming less importance, if it even now has not become meaningless.

² *Baldwin v. New York Life Ins. Co.*, 3 Bosw. 530.

³ *Evans v. United States Life Ins. Co.*, 64 N. Y. 304; affirming 3 Hun, 587.

⁴ *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543, where both of the preceding cases are referred to.

⁵ *Evans v. United States Life Ins. Co.*, *supra*.

feudant to go to New Orleans and remain there until the first day of July, 1870. The claim on behalf of the plaintiff is that he (insured) became so sick and feeble that he could not return, and hence that his return was rendered impossible by the act of God, and that therefore his absence was excused and there was no breach of the policy. Even if this claim were otherwise valid the facts do not sustain it. The only proof upon the subject is that he met with an accident before going south; that his health was very poor in the summer of 1870, and ‘he could only ride out to the plantation in which he was interested in a buggy, and ride back, not getting out of it, and was never any better.’ No witness testified that he was too unwell to return north, or that he made any effort to return, and his condition before July first was not described. To bring the case within the supposed rule there should have been proof that for some time before July first he was unable to travel by any of the usual modes; not that it was merely inconvenient for him to travel, but impossible. He was bound to return if he could travel by short stages, or by incurring unusual expense to secure comfort, safety and convenience. But another answer to this claim is that he took the chances of being unable to return. He went south for business purposes, knowing that the policy would be avoided if he did not return by the first day of July. He had the right to go and remain there until July first without the permit of the company. He obtained that that he might, without violating another condition in the policy, go and return upon the ocean if he desired to. He was feeble when he went and he could not go so far south that he could not return, and after remaining there until he was too feeble to return, enable the holder of the policy to claim that his return was rendered impossible by the act of God, and that thus the breach of the condition was excused.”

§ 325. **Change of Occupation to one more Hazardous or one Prohibited.**¹—A condition of forfeiture if the assured engage in another, or forbidden business, will be enforced; and if the condition is that if the member of a benefit society shall engage in a prohibited occupation his membership shall be *ipso facto* forfeited, such a condition is self-executing.² A condition that the insured shall not change his occupation to one more hazardous is not violated if the insured casually engage in a different business. As for example, if a teacher temporarily work upon a building he is erecting for himself and is killed while so doing.³ Or if a slave, who was a laborer in a tobacco warehouse, be killed while being removed to a plantation north of New Orleans, the policy forbidding a removal to more southern localities.⁴ If the insured engage in any occupation prohibited by the terms of the policy it will be void, if so provided in the contract.⁵ The construction of these conditions will be strict; for example, merely owning a half interest in a saloon is not “keeping” a saloon.⁶ A prohibition against entering the military service is not unusual. It has been held that this does not apply where a person occupied a mere clerical position in the office of the adjutant-general,⁷ but does if the insured connects himself in any way with the belligerent force,⁸ and it is immaterial whether the service was voluntary or involuntary.⁹ It has been held that whether being

¹ See also *ante*, § 323, and *post*, § 491.

² See *ante*, § 323.

³ *Stone v. United States Casualty Co.*, 34 N. J. L. 371.

⁴ *Summers v. U. S. Annuity, etc., Co.*, 13 La. Ann. 504.

⁵ *Northwestern Mutual Life Ins. Co. v. Amerman*, 119 Ill. 329; 10 N. East. R. p. 225. See cases cited *ante*, § 323.

⁶ *Union Central L. Ins. Co. v. Hughes*, 110 Ky. 26; 60 S. W. R. 850.

⁷ *New York Life Ins. Co. v. Hendren*, 24 Gratt. 540.

⁸ *Mitchell v. Mut. L. Ins. Co.*, cited *Bliss L. Ins. Co.* 699; *LaRue v. Kans. M. L. Ins. Co. (Kan.)*, 75 Pac. R. 494.

Dillard v. Manhattan L. Ins. Co., 44 Ga. 119.

a chaplain in the army is being in the "military service" within the meaning of these words in a policy of life insurance is a question for the jury.¹ In one reported case² the contract provided that the insurance should be avoided if death resulted from any of the casualties of war or rebellion, or from belligerent forces in any place where the insured might be. The insured was killed just after the civil war by a roving guerrilla band. The court held that the proviso did not attach, for it was the same as if the insured had been murdered by a robber, the band in question being mere robbers.

§ 326. **Intemperance.** — There may be in the policy an agreement as to the habits of the insured. The usual conditions are that the policy shall be void if the insured becomes "so far intemperate as to impair his health or induce *delirium tremens*." The fact that drunkenness is a disease does not lessen the force of a promissory warranty. In a case in Indiana the court said:³ "Appellees' counsel quote from eminent writers on medical jurisprudence, showing that drunkenness is a disease, and that it is liable to occur periodically, and argue from these facts that the company, knowing that Bodurtha was diseased, and the cause of it, having issued the policy, cannot now honestly refuse payment. We think it would be a dangerous precedent to hold that the deplorable conditions, physical and mental, which are likely to follow the immoderate use of intoxicants, should preclude business transactions with one who in the past may have been the victim of the habit, but who promises to be temperate in the future, and to release such party from the obligations

¹ *Mut. Ben. L. Ins. Co. v. Wise*, 34 Md. 582.

² *Welts v. Conn. Mut. L. Ins. Co.*, 46 Barb. 412.

³ *Northwestern L. Ass. Co. v. Bodurtha*, 23 Ind. App. 121; 53 N. E. R. 787.

of a valid contract because of his failure to keep this promise." In a case in Illinois¹ the beneficiary certificate given to a member of an order, witnessed that he was entitled to certain rights and privileges of the order, and the same was issued upon the express condition that he should, while a member of the order, faithfully maintain his pledge of total abstinence, and comply with all the laws, rules, regulations and requirements of the order, otherwise it to be of no effect, and if the member should die in good standing the beneficiary should be entitled to certain benefits. The Supreme Court held that as the requirements in the condition were used conjunctively, a compliance with all of them was necessary to a recovery, and that a violation of the pledge of total abstinence, alone, would bar a recovery by the beneficiary.² Where the application contained a recital that if the applicant, at that time represented to be temperate, "become as to habits far different from the condition in which he is represented to be, so as to increase the risk on the life insured, the policy shall become null and void," and the policy expressed "that if any of the declarations and statements made in the application shall be found in any respect untrue," that it shall be void; it was held³ that this was an express warranty that the insured would not alter his habits, and it having been proved that he had become so far intemperate as to increase the risk, the policy was avoided.⁴ But if the right is reserved to cancel the policy, because of intemperance sufficient to impair health, there

¹ *Royal Templars of Temperance v. Curd*, 111 Ill. 284.

² See also *Hogins v. Sup. Counc. Champions of Red Cross*, 76 Cal. 109; 18 Pac. Rep. 125.

³ *Boyle v. Phoenix Mut. L. Ins. Co.*, Ramsay's App. Cases (Lower Canada), 379.

⁴ See *Knecht v. Mut. L. Ins. Co.*, 90 Pa. St. 118; *Schultz v. Mut. L. Ins. Co.*, 6 Fed. Rep. 672.

must be actual existence of the fact, not conjecture.¹ In a case in the United States Circuit Court² the court instructed the jury to the effect that the impairment of health, contemplated by the condition that the policy shall be void if the insured becomes “so far intemperate as to impair his health or induce delirium tremens,” is not necessarily permanent or irremediable, nor is it the temporary indisposition, or disturbance usually resulting from a drunken debauch, but it is the development of disease, or the impairment of constitutional vigor, by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance. “A single excessive indulgence in alcoholic liquors is not intemperate, but there must be such frequency in their use, continued for a longer or a shorter period, as indicates an injurious addiction to such indulgence.” But, upon appeal to the Supreme Court of the United States,³ the case was reversed, the court saying: “The effect of these and other instructions was that the policy should be void if the insured became so far intemperate as to impair his health, was not broken unless intemperance became the habit or rule of his life after the policy was issued. The jury may have believed—and there was some, we do not say conclusive, evidence to justify them in so believing—that the efficiently controlling cause of the death of the insured was an excessive and continuous use of strong drinks for several days and nights immediately preceding his death; yet they were not at liberty, under the instructions, to find that he became so far intemperate as to impair his health, unless it further appeared that his intemperance in the use of alcoholic stimulants covered such a period of time as to constitute the

¹ *Janneck v. Metropolitan L. Ins. Co.*, 162 N. Y. 574; 57 N. E. R. 182, aff'd, 43 N. Y. Supp. 669.

² *Davey v. Aetna L. Ins. Co.*, 20 Fed. Rep. 482.

³ *Aetna L. Ins. Co. v. Davey*, 123 U. S. 739; 8 Sup. Ct. Rep. 333.

habit of his life. This construction of the contract is, in our judgment, erroneous. If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words, 'so far intemperate as to impair his health,' although he may not have had delirium tremens, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether the death was so caused is a matter to be determined by the jury under all the evidence."¹ On a retrial of the case² the court charged the jury that if the assured died from a simple debauch, although he had previously been temperate, it was a violation of the condition. The jury again found for the plaintiff and on appeal the judgment was affirmed.³ Intemperance is a question of fact and once being drunk cannot be said to make a man intemperate.⁴ The words temperate or sober refer to general habits or usual practice or conduct of life.⁵ Under a somewhat similar clause the Supreme Court of Pennsylvania held⁶ as follows: "The whole defense arises under this clause in the policy: 'It is further agreed and understood, that if he shall become so far intemperate, as to seriously or permanently impair his health or induce delirium tremens,

¹ See also *Northwestern Ins. Co. v. Muskegon Bank*, 122 U. S. 502; 7 Sup. Ct. Rep. 1221; *Insurance Co. v. Foley*, 105 U. S. 350.

² *Ætna L. Ins. Co. v. Davey*, 38 Fed. R. 650; 40 Fed. R. 911.

³ *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76; 11 S. C. R. 720.

⁴ *Meacham v. N. Y. State, etc., Assn.*, 120 N. Y. 237. 24 N. E. R. 283. *Moore v. Prudential Ins. Co.*, 87 N. Y. Supp. 368.

⁵ *Ætna L. Ins. Co. v. Davey*, *supra*; *Van Valkenburgh v. Am. Popular L. Ins. Co.*, 70 N. Y. 605; *Ins. Co. v. Foley*, 105 U. S. 350; *Swick v. Home L. Ins. Co.*, 1 Dil. 160; *Union Mut. L. Ins. Co. v. Reif*, 36 Oh. St. 599; *Fox v. Penn. M. L. Ins. Co.*, 4 Big. L. & Acc. Cas. 458.

⁶ *Odd-fellows' Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59.

then this company shall not be liable.' Thus, no degree of intemperance was sufficient to defeat a recovery unless it had the effect 'to seriously or permanently impair his health or induce delirium tremens.' Any less effect was insufficient. No offer to prove that Rohkopp's intemperance produced any such effect was rejected. The rejected offer covered by the first assignment [of errors] clearly shows that the company did not consider habitual intemperance any ground for refusing a risk. It was to prove that Rohkopp was an habitual drunkard for many years prior to and at the time the insurance was taken; that he had created an appetite which had become fixed upon him; but that it had not seriously impaired his health at that time. The offer did not propose to show that he thereafter became so intemperate as to either 'seriously or permanently impair his health.' It was to show 'by experts that the amount he had drank before and the amount he had drank afterwards was sufficient to seriously impair a man's health.' The capacity of persons to drink liquor is so unequal, and the effect is so different on different individuals, it by no means follows that a quantity sufficient to affect some other man's health had the same effect on the health of Rohkopp. The question in issue was, did his intemperance so affect him? The court opened the door wide and permitted the plaintiff in error to give all the evidence offered of Rohkopp's intemperate habits and of the effect on him. That he was habitually intemperate was not denied or controverted. It was clearly proved. The contention was whether its effect was such as to bring him within the clause of the policy which would prevent a recovery. Possessing a constitution and health, which habitual intemperance for so many years had been unable to seriously injure, showed a capacity to withstand its action, that justly confined the evidence to the affect the liquor had on him, and not what effect it might have on some other person.'" A

specific stipulation in a separate clause of a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture.¹ The phrase, *delirium tremens*, has an ordinary and accepted meaning, as recognized by all lexicons of the English language and is in common use by English speaking people and the words when used in life insurance policies are to be taken in their usual sense and the standard dictionaries are to be looked to for a definition.² Where the assured covenanted not to "practice any pernicious habit that obviously tends to shorten life," it was held that an excessive use of alcoholic liquors was such a pernicious habit as avoided the policy.³ Evidence of the reputation of the insured as to drinking is admissible.⁴ The St. Louis Court of Appeals has defined the term "habitual drunkard" as follows: "Appellant further complains of the refusal of certain instructions proffered by it as a definition of an habitual drunkard and the giving on that subject of the following instructions of the court's motion, to wit: 'The court instructs the jury that an habitual drunkard is a person given to inebriety or the excessive use of intoxicating drinks who has lost the power, or will, by frequent indulgence, to control his appetite for it.' This instruction is a verbatim copy of the definition of an habitual drunkard given in Bouvier's Law Dictionary. The state of drunkenness is one where the passions are visibly excited or the judgment impaired by

¹ *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212.

² *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384; 24 N. E. R. 86.

³ *Schultz v. Mut. L. Ins. Co. of New York*, 6 Fed. Rep. 672. See also *post*, § 328.

⁴ *Neudeck v. Grand Lodge A. O. U. W.*, 61 Mo. App. 97.

⁵ *Sitton v. Grand Lodge, etc.*, 84 Mo. App. 208.

the stimulant of drink or drug. It necessarily involves a temporary loss of full self-control on the part of the person affected. By constant indulgence it becomes habitual. In other words, as has been well said, 'the only rule is, has he a fixed habit of drunkenness?'¹ The foregoing instruction did not require proof of greater addiction to drink than is necessary to constitute an habitual drunkard under the doctrine of the cases cited. A dissection and analysis of the instruction as a whole will also demonstrate that it only contains an equivalent statement of the rule that an habitual drunkard is one who has acquired a fixed habit of drunkenness. For it may be justly said, a person who has lost the power or will (inclination) not to do a certain act has acquired a fixed habit of doing it. Now the particular act supposed in the instruction is 'inebriety,' which term is a mere Latin derivative having the same meaning as drunkenness. It follows, therefore, that the effect of the instructions was to tell the jury that they must find that the assured had acquired a fixed habit of inebriety or drunkenness before they could find that he was an habitual drunkard, which is a strictly accurate statement of the rule deduced from reason and precedent. The instruction under review predicates its conclusion upon either of two propositions: First, loss of power, caused by indulgence in drink, to avoid drunkenness; second, loss of will or inclination, caused in the same manner, to abstain from drunkenness. Both of these propositions express simple truths, verified by every-day observation and plain principles of science, in the light of which it is undeniable that men from frequent over-indulgence in drink, either lose the power or inclination to refrain from gratifying the appetite thus created. It is not true that men only become habitual drunkards from lack of power to live other-

¹ *Luderick v. Commonwealth*, 18 Pa. St. 172-175; *Insurance Company v. Bank*, 122 U. S. 501; *Magahy v. Robert Magahy*, 35 Mich. 210.

wise. Many of them reach that state from simple choice, impelled by the gratification which they experience in the mere sensuous effects of stimulants. This latter view was one of the alternatives clearly expressed in the instruction under review, and which the learned counsel for appellant appears to have overlooked in his criticism of the instruction. It is true that the declaration of law contained in the instruction is expressed in abstract and general terms. It did not, however, incorrectly define an habitual drunkard in the light of the decisions on that subject, and the record wholly fails to show that defendant was prejudiced on account of the want of more particularity and greater fullness in the instruction of the court.’’

§ 326a. **Consequences of Violation of Promissory Representations.** — If the contract provides that the violation of any promissory representation, such as the drinking of liquor, or engaging in a more hazardous occupation, or becoming intemperate to a specified degree, shall have the effect of making void the certificate or policy, such a stipulation will be upheld, and the contract becomes void *ipso facto*.¹ But if the contract provides merely that a member of a society shall not engage in a certain occupation or do certain things, the member is in good standing and the contract in force until a trial and conviction is had for such offense.² In a case in Iowa,³ the laws of the society provided, as a prerequisite to eligibility, that the appli-

¹ *Hogins v. Supreme Council Champions of the Red Cross*, 76 Cal. 169; 18 Pac. Rep. 125; *Supreme Council Royal Templars of Temperance v. Curd*, 111 Ill. 284; *Smith v. Knights of Father Mathew, etc., Society*, 36 Mo. App. 184; *ante*, § 323, *et seq.*

² *High Court I. O. Foresters v Zak*, 136 Ill. 185; 26 N. E. R. 593; *post*, § 389. See also *Steinert v. United Brotherhood, etc. (Minn.)*, 97 N. W. R. 668.

³ *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Ia. 107; 47 N. W. R. 983. See as to after-enacted laws, *ante*, § 161a.

cant should not be engaged in any extra-hazardous business. A by-law was afterwards adopted declaring that members might engage in any lawful occupation, not extra-hazardous, and specifying certain employments as extra-hazardous, among them that of car-coupler. The member became such while a car-sealer but afterwards became a car-coupler and while engaged in that occupation received an injury resulting in death; the court held that, as he was eligible and became a full member by the issuance of the certificate, the change of occupation did not work a forfeiture, although after the issue of the certificate, a by-law was adopted forbidding members to engage in extra-hazardous occupations, among them that of car-coupler. The court said: "The question is, did he (Hobbs) cease to be such member by reason of his change of employment? By-law No. 12 defines the occupation of car-coupler as extra-hazardous. If it be conceded that the by-law named became a part of the contract of insurance we have the case of one who, being a member of the association, adopted an occupation which would have disqualified him as an original applicant for membership. The contract of insurance contains nothing in regard to change of occupation by a member. By-law No. 12 allows members to engage in any lawful occupation which is not hazardous, but does not state the effect which shall follow their engaging in one which is hazardous. It will not do to say that hazardous occupations are forbidden by necessary implication and therefore that the forfeiture of the certificate must follow the adopting of such an occupation for the reason that the certificate and application specify the conditions on which the contract shall become void, and the adopting of a hazardous occupation is not one of them." Although the violation of a promissory representation as to occupation, or habits, may render void the contract, such a consequence may be avoided by the company becoming estopped by receipt of

premium, or knowledge without action, from insisting upon it.¹

§ 327. **Death from Specified Causes may avoid the Policy.** — It is usual in this country for a condition to be inserted in life insurance policies that the insurer shall not be liable if the death of the assured be caused by intemperance, suicide, or violation of law, or if he die at the hands of justice. It was formerly a common provision that the policy should be void if the insured died “on the high seas.” Interesting questions have arisen upon the construction to be given this condition and what facts are necessary to bring the case within the proviso so as to relieve the insurer. These questions will now be examined, for they have been discussed by the courts with considerable logic and research.

§ 328. **Intoxicants.**² — A provision that the policy shall be void if death results from the excessive use of intoxicating liquor, or if the assured shall become a drunkard, is valid and will be enforced. Insanity will not excuse a breach.³ The condition does not apply when the drug is taken under advice of a physician.⁴ Where the policy provided that it should be void if the “death be caused by the use of intoxicating drink or opium,” it was said by the Supreme Court of Maryland⁵ that this means “that the things prohibited should be the

¹ *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; 16 Atl. Rep. 263; *Grand Lodge A. O. U. W. v. Brand*, 29 Neb. 644; 46 N. W. R. 95. See *post*, 431, *et seq.*

² See also *ante*, § 231.

³ *Kempe v. Woodmen, etc.* (Tex. Civ. A.), 44 S. W. R. 688; *Marcoux v. Society, etc.*, 91 Me. 250; 39 Atl. R. 1027.

⁴ *Renn v. Supreme Lodge K. of P.*, 83 Mo. App. 442; *Endowment Rank, etc., v. Allen*, 104 Tenn. 623; 58 S. W. R. 241.

⁵ *Mut. L. Ins. Co. v. Stibbe*, 46 Md. 302.

direct cause of the death in order to avoid the policy.' The fair deduction from a decision of the Supreme Court of the United States¹ is that, under a similar condition, the use of intoxicating drink or opium must be the *substantial* cause of death. In an English case the policy provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor, or exposing himself to any unnecessary danger or peril. The assured, being more or less under the influence of liquor, accosted a woman in the street, and, persisting in so doing in the face of remonstrances, was knocked down by a man in whose company she was, and received injuries from which he died. It was held² that it was not necessary that the assured should be under the influence of intoxicating liquor at the time of his death, as well as at the time when the injury was sustained, but that it was sufficient to show that he was under such influence when he met with the injury from which death resulted afterwards. It was also said that the words, under the influence of intoxicating liquor, means such influence as to disturb the quiet equable exercise of a man's intellectual faculties. Also that the latter part of the proviso, with regard to willful exposure to peril, should be limited to dangers *ejusdem generis* with those recapitulated in the earlier part of the clause, and did not extend to the exceptional circumstances under which the insured met his death.³ In a case decided by the Supreme Court of Iowa,⁴ the policy provided that it should be void if the insured should die "by reason of intemperance from the use of intoxicating

¹ *Ætna L. Ins. Co. v. Davey*, 123 U. S. 739; 8 Sup. Ct. Rep. 331; on retrial, 38 Fed. R. 650; 40 Fed. R. 911; *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76; 11 S. C. R. 721.

² *Mair v. Railway Passengers' Assn. Co.*, 37 L. T. 356.

³ See *Shader v. Railway Passengers' Assn. Co.*, 3 Hun, 424; 5 N. Y. St. R. 643; *Macrobbe v. Accident Ins. Co.*, 13 Scot. L. Rep. 391.

⁴ *Miller v. Mut. Benefit Ins. Co.*, 34 Ia. 222.

liquors.” The deceased was given to periodical debauches. During one of these, and while suffering from delirium tremens, the insured escaped from those who had him in charge, ran into the open air and through the streets in inclement weather, without clothing, contracting cold from such exposure. This cold resulted in congestion of the lungs and brain, from which he died. It was held that these facts supported the conclusion that the death was caused by intemperance. The same court in a previous consideration of the same case,¹ approved an instruction of the lower court that the jury, in order to sustain the defense that the death was caused by liquor, must find more than that the death was only contributed to by the intemperate use of drink, and that the sole or paramount cause of the death was the intemperate use of intoxicating liquors. The court said: “The defendant claims that ‘if intemperance shortens life, it is a cause of death within the meaning of the policy,’ and that the policy is thereby avoided. It rarely, if ever happens, that the intemperate use of intoxicating drinks is indulged in for a considerable period without, to some extent, shortening life. The consequences of the construction contended for by the defendant would therefore be, that an insurance company which had assured the life of one known to be intemperate, and which had charged a higher rate of insurance in consequence of such fact, could exonerate itself from liability upon the policy by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate or predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to deter-

¹ *Miller v. Mut. Benefit Ins. Co.*, 31 Ia. 235.

§ 328a CONDITIONS WHICH AVOID THE RIGHT.

mine which was the remote and which the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the mediate cause. Nor is the difficulty in questions of kind any greater than that which arises in questions of negligence, contributory negligence, and many others which are constantly the subjects of judicial investigations.”¹

§ 328a. **Condition as to use of Narcotics.** — It is usual in life insurance contracts, to insert a condition against the use of narcotics, providing for forfeiture in event of the violation of such condition, or a provision that the contract shall be void if the death be caused by the use of such narcotic drug. Such conditions are to be strictly construed. A representation in an application for life insurance that the applicant had never been addicted to the excessive or intemperate use of alcoholic stimulants or opium, and that he did not use alcoholic stimulants often or daily, refers to an habitual use, and is not a representation that he did not use such stimulants or opium at all.² And an application for insurance stating that the insured used no narcotics is a representation and not a warranty, and is not violated by the occasional, but not frequent, use by the insured shortly before his death of a narcotic as a remedy where such representation was not made with a

¹ *Holteroff v. Mut. Ben. L. Ins. Co.* (Cin. Superior Ct.), 4 Big. L. & A. Ins. Cas. 395; *Ranney v. Mut. Ben. L. Ins. Co.*, cited May on Ins., § 302, tried in U. S. Cir. Ct. Dist. of Mass.; *Beller v. Supreme Lodge K. of P.*, 66 Mo. App. 449; *Mut. L. Ins. Co. v. Stribbe*, 46 Md. 302. In *Hanna v. Conn. Mut. L. Ins. Co.*, 28 N. Y. Supp. 661, the complaint was dismissed because the affidavit of the beneficiary as to cause of death showed that the remote cause of death was alcoholism, the policy being conditioned to be void if the assured became “so far intemperate as to impair his health,” although the proofs also showed that the immediate cause was alcoholism and extreme prostration. See also *Dennis v. Mut. L. Ins. Co.*, 84 Cal. 570; 24 Pac. R. 120.

² *Ætna L. Ins. Co. v. Davey*, 123 U. S. 739; 31 L. Ed. 315.

purpose to deceive, and it is not claimed that such use of narcotics increased the risk.¹ And this is true where the drug is administered by a physician in the course of medical practice, though death is thereby caused, or when the drug is taken under the advice of a physician.² Neither is death from an overdose of laudanum while in a drunken condition, death by his own hand within the meaning of a condition in an insurance policy upon the life of a person so dying.³ But the death of the insured from laudanum, taken with the intent to destroy life, is dying by his own hand within the meaning of a condition in a life insurance policy against such death, though done while in a drunken condition.⁴

§ 328b. **Suicide.** — Some of the most interesting discussions to be found in the reports are those of the construction to be given a clause in a life insurance policy absolving the company from all liability if the insured die “by his own hands” or “by suicide.” The policies of the various companies greatly differ in their language in regard to the voluntary death of the insured, as they have endeavored to except suicidal deaths from their undertaking. The subject is of greater importance to life insurance companies than to benefit societies, for very few of the latter attempt to distinguish between deaths that are suicidal and those resulting from other causes. It is unnecessary to even attempt any argumentative or philosophical discussion of the subject, but to briefly review some of the leading cases upon the subject so that a few general rules may be deduced from

¹ *Continental L. Ins. Co. v. Thoena*, 26 Ill. App. 495; *Higbie v. Guardian Mut. L. Ins. Co.*, 66 Barb. 462.

² *Renn v. Supreme Lodge K. of P.*, 83 Mo. App. 442; *Endowment Rank K. of P. v. Allen*, 104 Tenn. 623; 58 S. W. R. 241.

³ *Equitable L. Assur. Soc. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535.

⁴ *Equitable L. Assur. Soc. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535. See also on this subject note to 39 L. R. A. 262

them. A provision of a policy that it shall be void in case of suicide is self-executing, the company relies on the condition of the contract, not upon rescission.¹

§ 329. **Where a Sane Person Takes His Life by Accident.** — In the first place, it seems settled that if a sane person accidentally, or by mistake, does any act which causes his death, it is not within the exception of a proviso that the policy shall be void if the insured die by his own hands “sane or insane,” “voluntary or otherwise.” A leading case on this subject is *Penfold v. Universal L. Ins. Co.*² In this case the Court of Appeals of New York said: “The ordinary clause in life policies, that the insurer shall not be liable in case the person whose life is insured shall die by his own hand or act, has been repeatedly the subject of judicial construction and it is now well settled that it is not to be construed as comprehending every possible case in which life is taken by the party’s acts and that an unintentional or accidental taking of one’s own life is not within the meaning of the clause. The taking of one’s own life, not accidentally, but under the influence of insanity, has also been determined not to be a violation of the condition, but there has been difference of opinion as to the degree or character of the insanity which exempts from the operation of the condition; some authorities holding that it must be such a degree of insanity as to deprive the party of knowledge of the nature and probable consequences of the act which produced the death, others adopting the rule of the criminal law, that he must have been so far deprived of his reason as to be unconscious of the moral obliquity of the act, and later cases holding that, although possessed of sufficient reason to comprehend the consequences of the

¹ *Dickerson v. N. W. Mut. L. Ins. Co.*, 200 Ill. 270; 65 N. E. R. 694; *affg.* 102 Ill. App. 270.

² 85 N. Y. 317; 39 Am. Rep. 660.

act and the moral wrong which it involved, yet if the patient was driven to it by an insane impulse, produced by disease, which disabled him from controlling his own actions, and the death resulted from that cause, the act was not voluntary and the condition was not violated.¹ The question in all cases of this character is the proper interpretation of a contract, and the point of inquiry is, what obligations the parties must, from the language used, with relation to the subject-matter and the circumstances, be reasonably supposed to have intended to assume. The clause against suicide is clearly intended to protect the insurance company against the fraudulent act of the insured, whereby he may, even at the sacrifice of his own life, secure a benefit to those whom he may desire to favor, at the expense of the insurance company. But, as has already been said, it has been held from the earliest day that a suicide committed in consequence of insanity was not within the meaning of the condition, although within its literal terms. The decisions establishing this doctrine were placed upon the ground that the death, though apparently caused by the act of the party, was not so caused in contemplation of law, because his mind did not concur in the act, his mental organs having been so diseased as to cease to control his actions, or to guide them in accordance with reason. At a later day in the history of life insurance, some companies, for the purpose of avoiding the difficulties involved in the inquiry as to the condition of the mind of the person committing self-destruction, stipulated for exemption from liability in all cases of suicide, whether 'sane or insane.' Others adopted the words 'voluntary or involuntary,' others, as in the present case, 'voluntary or otherwise.'

¹ *Van Zandt v. Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215; *Newton v. Ins. Co.*, 76 N. Y. 426; 32 Am. Rep. 335; *Meacham v. N. Y. State, etc., Assn.*, 120 N. Y. 237; 24 N. E. R. 283.

It would not be a fair interpretation of this clause, in either of the forms mentioned, to hold it to cover the case of a purely accidental death from poison occurring to a sane person, through mistake or ignorance, though his own hand might have been the innocent instrument by which the deadly potion was conveyed to his lips. Such an accident cannot be presumed to have entered into the minds of the contracting parties, or to have been intended to be stipulated against. The insurance was intended to cover the risk of premature death, which might result from any of the casualties to which human life is subject — self-destruction being excepted. A purely accidental act, committed by a sane person, with no idea of injuring himself, cannot be regarded as an act of self-destruction within the meaning of such a contract. Suicide is the act stipulated against. The words ‘voluntary or otherwise’ preclude the parties claiming under the policy, if the act was one of suicide, from setting up the condition of the mind of the party committing it, and contending that it was an involuntary act of suicide. But still it must be a suicide, and who would contend that the taking of poison by mistake, or any other act which a sane person might innocently commit, though it should result in death, was what is ordinarily understood as self-destruction or suicide? It is unreasonable to suppose that one effecting an insurance upon his life in stipulating against death by his own hand or act, could intend to embrace such a casualty or that the insurance company could fairly expect him to so understand.” This view is substantially supported by the authorities in other States,¹ and it does not alter the rule that the de-

¹ *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; *Lawrence v. Mut. L. Ins. Co.*, 5 Bradw. 280; *Keels v. Mut. Reserve F. L. Ins. Assn.*, 29 Fed. Rep. 198; *Edwards v. Travelers L. Ins. Co.*, 20 Fed. Rep. 661; 22 Blatchf. 225; *Suppiger v. Covenant Mut. Ben. Assn.*, 20 Bradw. 595; *Sargent v. Home Benefit Assn.*, 35 Fed. R. 711; *Michigan Mut. L. Assn.*

ceased was negligent or careless at the time the accident occurred.¹ Where the proof shows that insured was found dead and that the death was from insanity it will not be presumed that insured committed suicide. The mere fact of death in an unknown manner creates no presumption that the death was not from natural causes,² but the evidence may exclude any other conclusion than that of suicide.³ This exception may even extend to cases where the insured is responsible for a condition in which he can have no intelligent idea of what he does. For example, where the insured drank to intoxication, and while in this condition, by accident or mistake, took an overdose of laudanum and died therefrom, it was held⁴ that this is not dying by his own hand in the sense of these words as used in the policy, even though the mistake or accident be in some sense occasioned by the drunkenness; but if he took the laudanum with intent to destroy his life, though it be but the intent of a drunken man, this is dying by his own hand. "Very clearly," says the court, "to our minds, a death by accident does not come within the description of dying by one's own hand. There must be an *intent* to commit suicide. Even though it be but the *intent* of a drunken man, however, it is none the less an intent."

§ 330. **Deliberate and Intentional Suicide by Sane Person.** — If a sane man deliberately takes his own life, it has been contended that it is such a fraud upon the insurers as to preclude recovery on the contract. In practice, however, such cases seldom occur, and it has been held that

v. Nangle, 130 Ind. 79; 29 N. E. R. 393; *Brown v. Sun Life Ins. Co. (Tenn.)*, 57 S. W. R. 415.

¹ *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Lawrence v. Mut. L. Ins. Co.*, *supra*.

² *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221; 24 Atl. R. 992.

³ *Sweezy v. Prudential L. Ins. Co.*, etc., 22 N. Y. Supp. 1054.

⁴ *Equitable Life Assn. Soc. v. Patterson*, 41 Ga. 338.

unless it is so stipulated in the policy suicide is no defense.¹ In one case the circumstances indicated deliberate suicide, but this point was not discussed.² The question, however, has now been settled by a decision of the Supreme Court of the United States,³ in which the court said: "It is contended that the court erred in saying to the jury, as, in effect, it did, that intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not in express words declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy, that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than willful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall

¹ *Horn v. Anglo-Australian, etc., Ass. Co.*, 30 L. J. Ch. 511; 7 Jur. (N. s.) 673; 9 W. R. 359; 4 L. T. (N. s.) 142; *Campbell v. Supreme Conclave, etc.*, 66 N. J. L. 274; 49 Atl. R. 550; 54 L. R. A. 576; *Parker v. Des Moines L. Assn.*, 108 Ia. 117; 78 N. W. 826, in which it was held that the fact that the policy is payable to a third party changes the rule laid down in the *Ritter* case, *infra*. To the same effect are *Seiler v. Economic L. Ass.*, 105 Ia. 87; 74 N. W. R. 941; 43 L. R. A. 537; *Patterson v. Natural Prem. L. Ins. Co.*, 100 Wis. 118; 75 N. W. R. 980; 42 L. R. A. 253; *Supreme Conclave, etc. v. Miles*, 92 Md. 615; 48 Atl. R. 845; *Supreme Lodge, etc. v. Underwood* (Neb.), 92 N. W. R. 1051. But in *Hopkins v. N. W. Life Ass. Co.*, 40 C. C. A. 1; 99 Fed. R. 199, it was held that the fact that the policy was payable to a third party is immaterial. All the cases, however, agree that the policy will be void if it be shown that the insured intended to commit suicide when the policy was taken out. See *post*, § 336.

² *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

³ *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139; 18 Sup. Ct. Rep. 300, affirming 69 Fed. Rep. 505 and 70 Fed. Rep. 954; 42 L. R. A. 583. See also *Mooney v. Ancient Order, etc.* (Ky.), 72 S. W. R. 288; 24 Ky. L. Rep. 1787; *Shipman v. Protected Home Circle*, 174 N. Y. 398; 67 N. E. R. 83, modifying 66 App. Div. 448; 73 N. Y. Supp. 594.

be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life intentionally precipitates the event upon the happening of which such liability was to arise? Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually, or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables, showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury.¹ If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and

¹ Railroad Co. v. Putnam, 118 U. S. 545, 554; 7 Sup. Ct. 1.

intentionally by self-destruction while the assured was in sound mind, but only death occurring in the ordinary course of his life. That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the 'provisions, requirements, and benefits' referred to in, and made part of, the policy. They show that the policy was issued on the 20-year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of 20 years from the date of issue; that after three full annual premiums were paid, the company would, upon the legal surrender of the policy, before default in the payment of any premium, or within six months thereafter, issue a non-participating policy for a paid-up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879;¹ that the assured was entitled to surrender the policy at the end of the first period of twenty years, 'and the full reserve computed by the American table of mortality, and four cent interest, and the surplus, as defined above, will be paid therefor in cash'; that, if the assured surrendered the policy, the total cash value at the option of the policy holder should be applied 'to the purchase of an annuity for life, according to the published rates of the company at the time of surrender'; that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that 'he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age, and military or naval service in time of war, shall be observed'; that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured

¹ Laws N. Y., c. 347.

should not be disputed; and that the party whose life was insured should always wear a suitable truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act, designed to bring about that event. In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured, and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance (that is, the life of the assured) shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option. That view is against the very essence of the contract. There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to en-

danger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy — taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such a policy is silent as to suicide, and the event insured against — the death of the assured — is brought about by his willful, deliberate act, when in sound mind? Light will be thrown on this question by some of the adjudged cases having more or less bearing upon the precise point now before this court for determination.”¹ There can be no doubt that if the facts show that the insurance was taken out with the deliberate purpose of committing suicide such a fraudulent intent may be shown and if substantiated, is a perfect defense. In one case² the evidence showed that the assured made application within a period of a few weeks to thirty-six different companies and secured policies to the amount of \$282,000 with the purpose of taking his own life. It was held that the policies were obtained by fraud. In this case the court reviews the sub-

¹ The court cites *Insurance Co. v. Terry*, 15 Wall. 580; *Insurance Co. v. Armstrong*, 117 U. S. 591; *Hatch v. Insurance Co.*, 120 Mass. 550; *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Amicable Society, etc. v. Bolland*, 4 Bligh. (N. S.) 194.

² *Smith v. National Benefit Soc.*, 123 N. Y. 85; 25 N. E. R. 197; *affg.* 4 N. Y. Supp. 521; 9 L. R. A. 616.

ject in its various phases and discusses the admissibility of evidence. The opinion of the court is as follows: "The facts of this case are unusual and extraordinary. In answer to the plaintiff's demand for the sum payable by the defendant's policy of life insurance the company took upon itself the difficult burden of proving that the assured perpetrated a deliberate fraud, planned upon a broad scale and accomplished by taking his own life; that his efforts to achieve success failing, and a future of poverty and debt seeming to await him, he determined to secure a large insurance upon his life, appropriate it to the payment of his creditors and the comfort and support of his relatives, and reach the result by suicide. The difficult burden was successfully borne, as the verdict of the jury has determined, and the sole inquiry now is whether the scope and range of the evidence admitted, showing the acts and declarations of the assured, transcended the lawful limit or violated the rules of evidence. The plaintiff was a creditor of the assured, and stands in the case as the assignee of the policy from the date of its transfer to him. He describes as a witness the manner of its acquisition. Tyler owed him about \$10,000, and upon demand of payment proposed to secure the debt by an insurance upon his life. The plaintiff assented. The conversation was in December, 1885, and, in pursuance of the agreement made, the policy now sued on was executed in June of the next year. By its terms the defendant constituted Tyler a 'benefit member' of the 'society' and agreed 'to pay to Fred H. Smith, creditor, if living, if not, to the heirs at law of said member,' the sum insured. The plaintiff having thus become the owner of the policy, objected on the trial to proof of the acts and declarations of Tyler as incompetent to affect or destroy the policy transferred. The general term questioned his right, considered as an assignment carrying a vested interest, and rely upon section 18, c. 175, of the

Laws of 1883, under which the defendant company was organized. That section attaches the beneficial interest to the membership and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect. But the statute does not prevent a contract between the parties by force of which a vested interest does pass; in which respect the present case differs from *Helmenberg v. District No. 1*.¹ There the designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and remaining wholly within his control. Here the transfer was as collateral security for an existing debt, and the fact brought to the knowledge of the defendant company, which explicitly promised to pay the plaintiff in his character as creditor. Granting however, that such was the relation of the parties, we are still of the opinion that no material error is shown by the record, since all the evidence to which objection was made came fairly within the *res gestae*, and the rule permitting proof of the actual transaction involved in the issue. The limitations upon that rule are easily stated but often difficult in their application. Those limitations were well described in *Tilson v. Terwilliger*.² The declarations must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain; and then they must so harmonize with those facts as to form one transaction. That transaction, the thing done, the fact put in issue, was the fraud which

¹ 94 N. Y. 580.

² 56 N. Y. 277.

evidently was not a simple, but a compound and continuous fact proceeding to its result by consecutive steps and separate acts, having necessarily an origin, a progress and an ultimate result, involving not only the intent of the assured, but also his sanity, without which the responsible intent could not exist. This fraud therefore could be studied and proved all along the line and in all its stages from origin to culmination formed part of the issue to be investigated. If in such a case declarations are excluded, which are merely narratives of a past transaction, the residue, so far as pertinent to the issue, will generally and with few exceptions be admissible in evidence. It is thus not difficult to decide that the proof of applications by Tyler to 36 different insurance companies, by which he secured \$282,000 of insurance upon his life, and his letters and telegrams to relations and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide, were all admissible. But some of the evidence was more remote and approached so near to the outside boundaries of the *res gestæ* as to require a specific and particular examination. The defendant was allowed to prove by Henry A. Bowen that in the summer of 1885 he went, at the request of Tyler, to the latter's friends to raise money for him; that he failed to accomplish the purpose, that on his return he had a conversation with Tyler in which he informed him of that failure, in reply to which Tyler said he was a man who must have money, and if he could not raise it he would commit suicide. This was a few months before the process of insuring began and tended to show two things, both of which were pertinent to the issue. It indicated an existing motive for the fraud in the want of money and the failure to obtain it, and the origin and occasion of the

alleged suicidal intent. The declaration accompanied and characterized an act which was itself admissible in evidence, for the act indicated the then desperate character of Tyler's financial situation, and the declaration explained the operation and effect of the fact upon his mind, its force and strength as a motive to the fraud, and the presence of a thought or contemplation of suicide in a contingency which did in fact occur. The evidence serves to indicate the origin and motive of the alleged suicidal intent, which grew to be the effective agency of the fraud. In the same connection the witness was permitted to detail inquiries which Tyler made of Sutkin as to the easiest mode of producing death. These inquiries were rather acts than declarations and show the assured in the process of acquiring information to effect easily and swiftly the destruction of his own life. Similar testimony of an intent to commit suicide rather than endure poverty, or hard labor, was given by the witness Trested, but in connection with inquiries about insurance, and with an endeavor to get into a benefit society connected with the hat trade. The witness added Tyler's declaration that he intended to put a large insurance upon his wife and make the boys happy. These acts and declarations all occurred before the plaintiff took his policy as collateral and when they affected no one but Tyler himself. They tended to show the origin and progress of the fraudulent intent, the manner of its growth, and the motive from which it sprung. They indicate a sane and deliberate purpose, moving steadily to its result and constitute a part of the history of the fraud. They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to produce an insurance upon his life which he knew he could not continuously maintain. They show the motive of the fraud and mark its progress and harmonize so completely

with all which afterwards occurred as to constitute with that element of the single transaction the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestæ* and did not transcend its limits. Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true, but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary therefore to prove it and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud. We think no error was committed in the admission of the evidence upon which the jury acted, and that after due consideration of the exceptions taken to the charge the case was fairly submitted for determination upon its facts." In *Fowler v. Mutual L. Ins. Co.*,¹ the facts showed such a deliberate suicide that the court withdrew the case from the jury and held that, under the stipulation that the policy should be void if the insured died "by his own hand," the plaintiff could not recover. Where a woman voluntarily caused an abortion to be performed on her, from the effects of which she died, it was held that, on the ground of public policy, a policy of insurance on her life was avoided.²

§ 331. **Suicide and Death "by his own Hand"** **Synonymous.**—Practically all the cases agree in holding, in the language of the Supreme Court of Massachusetts³ that: "There is no substantial difference of signification between the phrases 'shall die by his own hand,' 'shall commit

¹ 4 Lans. 202.

² *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550. But this case more properly belongs under the class of deaths caused by violation of law.

³ *Cooper v. Mass. Ins. Co.*, 102 Mass. 227.

suicide' and 'shall die by suicide.''' And the Supreme Court of the United States has said:¹ "It was argued that the word 'self-destruction' as here used was more comprehensive than suicide, and included an intentional, though insane killing of oneself. But the two words are treated as synonymous in the very clause in question as well as in the former opinions of this court. The act, whether described by words of Saxon or Latin origin, or partly of the one and partly of the other, 'dying by his own hand,' 'self-killing,' 'self-slaughter,' 'suicide,' 'self-destruction,' without more cannot be imputed to a man who, by reason of insanity (as is commonly said) 'is not himself.''' The rule of construction, though not always expressly recognized by the cases, is that this condition, being in the nature of a penalty or forfeiture, must be strictly construed. This was the view of the Supreme Court of Michigan,² and commends itself as one eminently in accordance with justice and reason.

§ 332. **English Rule as to Suicide**—In England a rule in relation to suicide was laid down in 1842 in *Borra-daile v. Hunter*,³ and has ever since been adhered to. In this case the words of the condition were that the policy should be void if the assured "should die by his own hands." He threw himself from Vauxhall bridge into the Thames and was drowned. The jury found that he "voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, and intending

¹ *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468. See also *Spruil v. N. W. Mut. L. Ins. Co.*, 120 N. C. 141; 27 S. E. R. 39; *Haynie v. Knights Templars*, etc., 139 Mo. 416; 41 S. W. R. 461; *Grand Lodge, etc. v. Wieting*, 168 Ill. 408; 48 N. E. R. 59; 61 Am. St. R. 123.

² *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41. See also *New Home L. Assn. v. Hagler*, 29 Ill. 437.

³ 5 Man. & G. 639; 5 Scott. N. R. 418; 12 L. J. C. P. 225; 7 Jur. 443; 2 Big. L. & Acc. Ins. Cas. 280.

thereby to do so, but that at the time of committing the act he was not capable of judging between right and wrong." It was held that the policy was void, the rule being laid down in effect that the moral condition of the mind was immaterial and if, when the act is done, the insured knew that his life would be thereby destroyed and intended it to be so, the policy is vitiated under the condition although the insured was insane at the time.¹ It is usual now in that country to incorporate in the policy an exception to the effect that death of the insured by suicide shall not avoid the policy if it has passed to a *bona fide* assignee. This exception has been held not to be against public policy, but it applies only to persons acquiring by assignment from the assured.² It does not apply in favor of an assignee by operation of law, as an assignee in bankruptcy.³

§ 333. **Conflict of Cases in America.** — In America the cases are in conflict and cannot be reconciled. They seem to divide themselves into two classes; the one class holds that the suicide clause does not apply where the insured is insane at the time of the act, but only includes cases of felonious suicide. The other class of cases takes the words

¹ *Dormay v. Borradaile*, 5 M. G. & S. 380; *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 599; 4 Jur. (N. S.) 841; 27 L. J. Ch. 817; *White v. British Empire, etc., Co.*, L. R. 7 Eq. 394; 19 L. T. (N. S.) 308; 17 W. R. 26; 38 L. J. Ch. 53. In *Schwabe v. Clift*, 2 Car. & Kir. 134; 3 Man., G. & S. 436; 17 L. J. C. P. 2, a distinction was attempted to be made between the words "commit suicide" and "die by his own hands," but this was reversed by the Exchequer Chamber in *Clift v. Schwabe*, 3 C. B. 437; 17 L. J. C. P. 2; 2 C. & K. 134 Ex. Ch.; 2 Big. L. & Acc. Ins. Cas. 312.

² *Moore v. Wolsey*, 4 El. & Bl. 243; 24 L. J. Q. B. 40; 4 Jur. (N. S.) 468; 28 Eng. L. & Eq. 248; *Dufaur v. Professional Life Ass. Co.*, *supra*; *Jones v. Consolidation Ins. Ass. Co.*, 26 Beav. 206; 5 Jur. (N. S.) 214; 28 L. J. Ch. 66; 3 Big. Life & Acc. Ins. Cas. 192; *White v. British Empire, etc., Co.*, *supra*.

³ *Jackson v. Forster*, 5 Jur. (N. S.) 547; 1 El. & Bl. 463; 2 Big. Life & Acc. Ins. Cas. 567.

in their plain and every-day significance and holds that the insurer is released if the insured intentionally takes his own life. The courts, in passing upon the question, have exhaustively treated it and considered the subject in all its features. It would be interesting to review the various decisions and trace step by step the progress of the discussion, but it is hardly necessary to do so. We shall briefly consider some of the leading cases and refer the reader for further light to other sources. The subject has been carefully and fully treated by the leading writers on life insurance and annotators.¹

§ 334. **The Most Approved Rule.** — We may take as the leading case upon this subject in the United States that of *Mutual Life Ins. Co. v. Terry*,² decided by the Supreme Court of the United States and approving what had been known as the New York doctrine. In this case the policy was to be void if the insured should “die by his own hand.” Justice Hunt, after a full review of the cases, laid down the general rule thus: “If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally take his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or

¹ Bliss on Life Insurance, § 230, *et seq.*; May on Ins., § 307, *et seq.* Appended to *Breasted v. Farmers' L. & T. Co.*, 59 Am. Dec. 487, is a most valuable note where the leading authorities are collated and digested. A full note is also appended to the case of *Insurance Co. v. Wiswell*, 56 Kan. 765; 35 L. R. A. 258; 44 Pac. R. 996.

² 15 Wall. 580; 7 Alb. L. J. 310; 3 Big. Life & Acc. Ins. Cas. 819; 2 Ins. L. J. 540; affirming 1 Dill. 403.

when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable.” This rule has been approved in subsequent decisions of the same court.¹ In Michigan the Supreme court has stated the rule, in somewhat different language,² but in effect the same, as follows: “The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term ‘suicide,’ as if it means a wrongful act or self-murder. It has no such restricted meaning. It means self-killing, just as ‘homicide’ means killing any one else. But there may be excusable homicide as well as felonious, and suicide was only cognizable at law when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense, the man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will. The clause punishing the insured for self-slaughter is a penal clause in the strictest sense of the term, and embraces several other acts in the same penalty, all of which involve voluntary wrong-doing. They are death by dueling, or by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance. When an act which is to cause forfeiture is classed among such wrongful conduct it is fairly to be inferred that it is regarded as *ejusdem generis*, and depending on the same reasons. A construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of life insurance is to provide for death by disease

¹ Insurance Co. v. R del, 95 U. S. 232; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, Justice Gray delivering the opinion of the court.

² John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

or in the ordinary course of nature. Death by his own hands, in the case of one *non compos*, is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical." In later cases,¹ it was held that, where there are no facts except the act itself to throw light on the condition of the assured as to his consciousness of the result that would follow the act, if the assured knew that he was taking his own life and showed sufficient intelligence to employ the means to accomplish the purpose, he was not unconscious of the consequences and the exemption of the society from liability results. The rule as above laid down is sustained by a preponderance of authority and must now be regarded as the settled rule in most of the States in the Union.²

¹ *Sabin v. Senate Natl. Union*, 90 Mich. 177; 51 N. W. R. 202; *Streeter v. Western Union, etc., Soc.*, 65 Mich. 199; 31 N. W. R. 779; following *Bigelow v. Ins. Co.*, 93 U. S. 284.

² *Breasted v. Farmers' Loan & Trust Co.*, 8 N. Y. (4 Seld.) 299; 4 Hill, 73; 59 Am. Dec. 482, is the earliest reported case, and held that a policy conditioned to be void if the insured died "by his own hand" was not avoided if at the time of the act the insured was insane. This case was modified, if not overruled, by *Van Zandt v. Mut. Ben. Life Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215; 4 Big. Life & Acc. Ins. Cas. 313, where it was held that, under a condition as above, the only exceptions to the condition is where the act is accidental or involuntary; that to take a case out of the proviso the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist; it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act. In later cases in the same State it is held that the words, "die by his own hand," have reference to "an intelligent, voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary." *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 235; *Weed v. Mut. Ben. Life Ins. Co.*, 70 N. Y. 561; *Newton v. Mut. Ben. Life Ins. Co.*, 76 N. Y. 426; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 321; *Estabrook v. Union Mut. L. Ins. Co.*, 54 Me. 224, approved *Breasted v. Farmers' L. & T. Co.*, *supra*, holding that suicide to avoid a policy of life insurance must be a criminal act, one done with an evil motive. Whether the act

A provision in a mutual benefit certificate that no benefit shall be paid on the death of a member committing suicide, unless the person claiming under the certificate shall prove that, prior to the suicide, the member had been judicially declared insane, or was under treatment for insanity at the time the act was committed, or was then in the delirium of other illness, operates only to entitle the beneficiary to recover after a death by suicide by proving that assured had been judicially declared insane, or was under treatment for insanity, or was in the delirium of other illness, but does not make such proof indispensable to a recovery after suicide; proof that the member was insane at the time of the suicide entitling the beneficiary to a recovery, though the other facts be not proved.¹ And the word "illness," in a benefit certificate, providing that the insurer will pay benefits of members who commit suicide in delirium resulting from "illness," does not refer only to such a sickness as confines one in bed.²

is voluntary or the result of an insane impulse is for the jury. *Meacham v. N. Y. State M. B. Assn.*, 103 N. Y. 237; 24 N. E. R. 283; affg. 46 Hun, 363. The rule as stated in the text is approved by the following cases, omitting all decided in the United States Circuit Courts, as necessarily they are bound by the decisions of the Supreme Court of the United States: *Hathaway v. National Life Ins. Co.*, 48 Vt. 335; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; 19 Am. Rep. 623; *Conn. Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; 27 Am. Rep. 689, which modifies *Am. Life Ins. Co. v. Isett*, 74 Pa. St. 176; *Scheffer v. National Life Ins. Co.*, 25 Minn. 534; *Phillips v. La. Ann. Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549; *Merritt v. Cotton States Life Ins. Co.*, 55 Ga. 103; 59 *Id.* 564; *Life Association, etc., v. Waller*, 57 Ga. 533; *Adkins v. Columbia L.f. Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush, 268; *Schultz v. Insurance Co.*, 40 Ohio St. 217; *Meacham v. N. Y. State Mut. Ben. Assn.*, 46 Hun, 363; *Mutual L. Ins. Co. v. Walden* (Tex. Civ. App.), 26 S. W. R. 1012; *Mooney v. Ancient Order United Workmen* (Ky.), 72 S. W. R. 288; 24 Ky. L. R. 1787.

¹ *Supreme Council R. A. v. Pels* (Ill.), 70 N. E. R. 697.

² *Supreme Lodge K. of H. v. Lapp* (Ky.), 74 S. W. R. 656.

§ 335. **The Rule in Massachusetts.** — In *Dean v. American Mut. Life Ins. Co.*¹ the Supreme Court of Massachusetts established a different rule of construction. In that case the condition was that the policy should be void if the insured should ‘die by his own hand,’ and the court elaborately reviewed the cases and arguments in support of both sides of the question, concluding that, if the person understood the nature of the act and intended to take his own life, though insane, the policy was avoided. Judge Bigelow, in the opinion, said: “The question in such cases is not how far can the literal meaning of words be extended; but, what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their position that the words are not to be interpreted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this, it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not

¹ 4 Allen, 96.

the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not expected, within the meaning of the proviso. A party cannot be said to die by his own hand, in the sense in which those words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control." In a subsequent case in the same court this opinion was adhered to.¹

§ 336. **Death by "Suicide Sane or Insane."** — To avoid the effect of these decisions it has become customary with life insurance companies to insert in their policies a stipulation that the contract shall be void if the insured shall "die by suicide, felonious or otherwise, sane or insane," or "by suicide, sane or insane," or "die by his own act or hand, sane or insane." These conditions have been generally upheld and successfully eliminate the element of suicide, so that no kind or degree of insanity will prevent the avoidance if the insured had the *intent* to do the act, even though, the intent of an unbalanced mind, or realized the physical consequences of his act.² This condition does not attach

¹ *Cooper v. Mass. Ins. Co.*, 102 Mass. 227; 1 Big. L. & Acc. Ins. Co. 758. This same doctrine was laid down in several cases in the Federal court, but those have been overruled by the Supreme Court of the United States. See *Nimick v. Mut. Ben. L. Ins. Co.*, 3 Brewst. 502; *Gay v. Union Mut. L. Ins. Co.*, 9 Blatchf. 142.

² *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; 5 Big. L. & A. Ins. Cas. 498; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Sup. Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Riley v. Hartford L. & A. Ins. Co.*, 25 Fed. Rep. 315; *Chapman v. Republic L. Ins. Co.*, 6 Biss. 238; *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *De Gorgorza v. Knickerbocker L. Ins. Co.*, 65 N. Y. 232; *Streeter v. Western Union, etc., Soc.* 65 Mich. 199; 31 N. W. Rep. 779; *Billings v. Accident Ins. Co., etc.*, 64

where there is an absence of intent, as in case of an accident.¹ The Supreme Court of the United States² has thus expressed the rule: "The condition here relieves the company from liability only when the self-destruction was intentional, or committed by a party who was conscious of the nature of the act he was committing, or about to commit, and conscious of its direct and immediate consequences, though the act may have been unaccompanied by any criminal, or felonious intent or purpose. It does not apply or relieve the company, where the death of the assured was accidental, or may be properly be said to have been caused by accident, though brought about, it may be, by his own hands, or by some dangerous or destructive instrument held in them." It has been held, however, that the word "insane," in this connection embraces every degree of insanity.³ Culpable negligence, as in taking an overdose of laudanum to relieve pain, will not vitiate the contract.⁴ Where the condition was that the policy should

Vt. 78; 24 Atl. R. 656; *Sabin v. Senate Nat. Union*, 90 Mich. 177; 51 N. W. R. 202; *Scarth v. Security M. L. Ins. Co.*, 75 Ia. 346; 39 N. W. R. 658; *Mut. Reserve Fund L. Assn. v. Payne* (Tex. Civ. A.), 32 S. W. R. 1063; *Weber v. Home, etc., Assn.*, 21 Ind. App. 345; 52 N. E. R. 462.

¹ *Edwards v. Travelers' L. Ins. Co.*, 22 Blatchf. 225; 20 Fed. Rep. 661; *Penfold v. Universal L. Ins. Co.*, 85 N. Y. 317; 39 Am. Rep. 660; *Keels v. Mut. Reserve F. L. Ins. Co.*, 29 Fed. Rep. 198; *Suppiger v. Covenant M. B. Assn.*, 29 Bradw. 595; *Union Mut. L. Ins. Co. v. Payne*, 45 C. C. A. 193; 105 Fed. R. 172; *Supreme Lodge, etc. v. Gelbke*, 198 Ill. 365; 64 N. E. R. 1058; *Hart v. Modern Woodmen*, 60 Kan. 936; 57 Pac. R. 936 and cases cited.

² *Bigelow v. Insurance Co.*, 93 U. S. 284, citing *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389.

³ *Tritschler v. Keystone M. B. Assn.*, 180 Pa. St. 205; 36 Atl. R. 734; *Keefer v. Modern Woodmen*, 203 Pa. St. 129; 52 Atl. R. 164; *Spruill v. N. W. Mut. L. Ins. Co.*, 120 N. C. 141, 27 S. E. R. 39; *Brower v. Supreme Lodge, etc.*, 74 Mo. App. 490; *Hart v. Modern Woodmen*, 60 Kan. 936; 57 Pac. R. 936; *Seltzinger v. Modern Woodmen*, 204 Ill. 58; 68 N. E. R. 478; *affg.* 106 Ill. App. 449; *Clarke v. Equitable Life, etc.*, 55 C. C. A. 200; 118 Fed. R. 374.

⁴ *Mut. L. Ins. Co. v. Lawrence*, 5 Bradw. 280.

be void if the insured should die by his own act or hand "voluntary or otherwise," the latter word was held too vague and uncertain to cover a case where the insured took his own life while insane.¹ In a case in Ohio,² where the policy was to be void if the insured "shall under any circumstances die by his own hand," the court held that the words "under any circumstances" should be disregarded as too general and indefinite.³

§ 336a. **Questions of Pleading, Evidence, etc., in Cases of Suicide.**—In a suit on a life insurance policy, which provides against liability for suicide, whether caused by insanity or not, and where suicide is pleaded as a defense, the burden of proving it is on the defendant.⁴ And when circumstantial evidence, only, is relied on the defense fails unless the circumstances exclude with reasonable certainty, any hypothesis of death by accident, or by the act of another.⁵ As where the assured cut an artery with broken glass.⁶ Where a note, evidencing an intention to end his life, was left by the assured, it was held that it excluded the hypothesis of accident.⁷ The presumption of

¹ *Jacobs v. National L. Ins. Co.*, 1 McArthur, 632; 5 Big. L. & Acc. Ins. Cas. 42; 4 Ins. L. J. 339.

² *Schultz v. Ins. Co.*, 40 Ohio St. 217.

³ See also *post*, § 496.

⁴ *Dennis v. Union Mut. L. Ins. Co.*, 84 Cal. 570; 24 Pac. 120; *Meacham v. N. Y. St., etc., Assn.*, 120 N. Y. 237; 24 N. E. 283; *Mut. L. Ins. Co. v. Tillman*, 84 Tex. 31; 19 S. W. R. 294; *Bachmeyer v. Mut. Reserve Fund Assn.*, 82 Wis. 255; 52 N. W. R. 101; *Washburn v. Nat. Accident Soc.*, 10 N. Y. Supp. 366.

⁵ *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189; 15 So. R. 388; *Mallory v. L. Ins. Co.*, 47 N. Y. 52; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43; 51 Pac. R. 488; *Grand Lodge, etc. v. Wieting*, 168 Ill. 408; 48 N. E. R. 59.

⁶ *Parish v. Mut. Ben. L. Ins. Co.*, 19 Tex. Civ. A. 457; 49 S. W. R. 153.

⁷ *Mut. L. Ins. Co. v. Hayward* (Tex. Civ. App.), 27 S. W. R. 36; *Fidelity M. L. Assn. v. Miller*, 34 C. C. A. 441; 92 Fed. R. 63; *Elliot v.*

§ 336a CONDITIONS WHICH AVOID THE RIGHT.

law is against suicide and the courts incline to the view that, as the gist of the act is the intent, there must be some evidence of an intention of suicide. The mere fact of the body of the insured being found with a pistol in his hand and a bullet wound in the head is ordinarily not sufficient to prove suicide.¹ Nor where the insured took acid in order to frighten his wife into giving him money.² An allegation that assured "did then and there immorally, wrongfully and willfully" commit suicide is an allegation that the assured committed suicide while sane.³ Where the evidence is conflicting as to whether death was caused by the intention or accidental act of deceased, it will be presumed that the death resulted from accident.⁴ And in actions upon life policies, where the defense is suicide, a wide latitude of evidence is permitted and all the facts bearing in any manner upon the mental condition, habits and circumstances of assured are admissible. It is an open question whether the coroner's inquest is admissible.⁵ It is not necessary to here examine in detail the cases which have discussed the admissibility of evidence, but the cases themselves must be examined.⁶ In all of these cases the various conflicting

Des Moines L. Ins. Co., 163 Mo. 132; 63 S. W. R. 400; Supreme Lodge etc. v. Foster, 26 Ind. App. 333; 59 N. E. R. 877.

¹ Union Mut. L. Ins. Co. v. Payne, 45 C. C. A. 193; 105 Fed. R. 172; Travelers Ins. Co. v. Niklas, 88 Md. 470; 41 Atl. R. 906.

² Courtemanche v. Supreme Council, etc. (Mich.), 98 N. W. R. 749; see also Supreme Council, etc. v. Heineman (Ky.), 78 S. W. R. 406.

³ N. W. Benevolent Assn. v. Bloom, 21 Ill. App. 159.

⁴ Ingersoll v. Knights of Golden Rule, 47 Fed. R. 272.

⁵ The following cases are in the affirmative: *Ætna L. Ins. Co. v. Kaiser*, 24 Ky. L. R. 2454; 74 S. W. R. 203; *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611; 43 N. E. R. 277; *Ins. Co. v. Schmidt*, 40 Ohio St. 112; *Knights Templar, etc., Co. v. Crayton* (Ill.), 70 N. E. R. 1066; *Grand Lodge, etc. v. Wieting*, 168 Ill. 408; 48 N. E. R. 59. *Contra*: *Wasey v. Travelers Ins. Co.*, 126 Mich. 119; 85 N. W. R. 459; *Louis v. Conn. M. L. Ins. Co.*, 172 N. Y. 659; 65 N. E. R. 1119.

⁶ *Bachmeyer v. Mut. Reserve Fund L. Assn.*, 82 Wis. 255; 52 N. W. 101; same case on second appeal, 87 Wis. 325; 58 N. W. R. 399; *Walcott*

circumstances bearing upon the question are fully discussed.¹ Where the application agreed that the loss should not be paid in case of death by suicide the certifi-

v. Metropolitan L. Ins. Co., 64 Vt. 221; 24 Atl. 992; *Sargent v. Home Ben. Assn.*, 35 Fed. R. 711; *Mut. Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541; 9 S. W. R. 812; *Washburn v. Nat. Acc. Soc.*, 10 N. Y. Supp. 366; *Meacham v. N. Y. St. Mut. Ben. Assn.*, 120 N. Y. 237; 24 N. E. R. 283; *Mut. L. Ins. Co. v. Tillman*, 84 Tex. 31; 19 S. W. 294.

¹ The presumption of law is, where a dead body is found and there is no direct evidence as to cause of death, that the death was neither by suicide nor murder. *Conn. Mut. L. Ins. Co. v. McWhirter*, 19 C. R. A. 519; 73 Fed. R. 444; 44 U. S. App. 492; *Stephenson v. Bankers L. Assn.* 108 Ia. 637; 79 N. W. R. 459; *Supreme Council, etc. v. Brashers*, 89 Md. 624; 43 Atl. R. 866; *Dickerson v. N. W. Mut. L. Ins. Co.*, 200 Ill. 270; 65 N. E. R. 694; affg. 102 Ill. App. 280. And where the evidence is equally balanced the finding should be against suicide. *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765; 44 Pac. R. 996; 35 L. R. A. 258. But where the evidence is conclusive, leaving no other conclusion possible, a peremptory instruction in favor of defendant should be given. *Sovereign Camp, etc. v. Haller*, 24 Ind. App. 108; 56 N. E. R. 255; *Agan v. Metropolitan L. Ins. Co.*, 105 Wis. 217; 80 N. W. R. 1120; *Pagett v. Conn. Mut. L. Ins. Co.*, 55 App. Div. 628; 66 N. Y. Supp. 804; *Hart v. Trustees Gr. Lodge, etc.*, 108 Wis. 490; 84 N. W. R. 851; *Inghram v. National Union*, 103 Ia. 395; 72 N. W. R. 559; *Kornfield v. Supreme Lodge, etc.*, 72 Mo. App. 604; *Somerville v. Knights Templar, etc., Co.*, 11 App. D. C. 417; *Wolff v. Mut. Reserve F. L. A.*, 51 La. Ann. 1260; 26 Sou. R. 89; *Fletcher v. Sovereign Camp, etc.*, 81 Miss. 249; 32 Sou. R. 923; *Voelkel v. Supreme Tent, etc.*, 116 Wis. 202; 92 N. W. R. 1104-1135; *Shottliff v. Modern Woodmen, etc.*, 100 Mo. App. 138; 73 S. W. R. 326; *Clement v. Supreme Lodge (Tenn.)*, 81 S. W. R. 1249. In the following cases the evidence was held insufficient: *Cox v. Royal Tribe, etc.*, 42 Oreg. 365; 71 Pac. R. 73; 60 L. R. A. 620; *National Union v. Bennett*, 20 App. D. C. 527; *Fidelity, etc. v. Egbert*, 28 C. C. A. 281; 84 Fed. R. 410; 50 U. S. App. 200; *National Union v. Thomas*, 10 App. D. C. 277; *Boynton v. Equitable L. Ass. Co.*, 105 La. Ann. 702; 29 Sou. R. 490; 52 L. R. A. 687. In addition to the cases already cited the following will be found instructive as bearing on questions of evidence: *Hale v. Life Indemnity, etc., Co.*, 65 Minn. 548; 68 N. W. R. 182; *Matlock v. Mut. L. Ins. Co.*, 37 W. N. C. 526; *Rens v. N. W. Mut. L. Assn.*, 100 Wis. 266; 75 N. W. R. 991; *Casey v. National Union*, 3 App. D. C. 510; *Ritter v. Mut. Life Ins. Co.*, 169 U. S. 159; 18 Sup. Ct. Repr. 300; *Sharland v. Washington L. Ins. Co.*, 41 C. C. A. 307; 101 Fed. R. 206; *Modern Woodmen v. Kozak*, 63 Neb. 146; 88 N. W. R.

cate and application were held one instrument.¹ The company is entitled to a sufficient time to learn of all the facts bearing upon the case by investigation and, although the policy provided that the amount should be paid within sixty days after due notice and proof, it was held,² that three months and a few days was not an unreasonable time to elapse before notifying the beneficiary of the result of the investigation.

§ 337. **When Suicide no Defense.** — Where the policy, or the constitution and laws of the society or order, contain no provision qualifying the right to recover if the assured or member takes his own life, suicide is not a defense.³ This statement must be understood however as qualified by the conditions that suicide was not contemplated when the policy was issued or was committed feloniously.⁴ It is a question, however, whether, if suicide was a crime under the statute law, a death by suicide would not be within a condition vitiating the policy if the assured should die in violation of, or any attempt to violate any criminal law of

248; *Brignac v. Pacific M. L. I. Co.* (La Ann.), 36 Sou. R. 595. Sanity in case of suicide is presumed. *Hopkins v. N. W. Mut. L. A. Co.*, 94 Fed. R. 729. As to instructions: *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611; 43 N. E. R. 277. Generally, see *Travelers Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; 38 N. E. R. 1110; *Johns v. N. W. M. R. Assn.*, 90 Wis. 332; 63 N. W. R. 276; 41 L. R. A. 587; *Brown v. Sun Life Ins. Co.* (Tenn. Ch.), 57 S. W. R. 415; 51 L. R. A. 252; *Standard L. & A. Ins. Co. v. Thornton*, 40 C. C. A. 564; 100 Fed. R. 582; 49 L. R. A. 116. See also *post*, § 497.

¹ *N. W. Ben.*, etc. *v. Hand*, 29 Ill. App. 731; *Sabin v. Senate Nat. Union*, 90 Mich. 177; 51 N. W. 202.

² *Salentine v. Mut. Ben. L. Ins. Co.*, 79 Wis. 580; 48 N. W. 855.

³ *Mill v. Rebstock*, 29 Minn. 380; *Darrow v. Family Fund Soc.*, 42 Hun, 245; *Freeman v. National Benefit Soc.*, *Id.* 252; *Fitch v. Am. Popular Life Ins. Co.*, 59 N. Y. 557; *Patrick v. Excelsior L. Ins. Co.*, 67 Barb. 202; 4 Hun, 263; *Kerr v. Union Benev. Assn.*, 39 Minn. 174; 39 N. W. R. 312; *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 22 N. E. R. 1093; *affg.* 42 Hun, 245.

⁴ See *ante*, § 330.

the United States or of the State or country where the¹ member may be. It has been held that a benefit society may enact a law, providing that the benefit shall be forfeited if the member take his own life "sane or insane," which will bind all members irrespective of the time when they became such, whether before or after the enactment of such law, provided the certificate or laws stipulate that the member shall comply with all the laws of the order then in force or those which may subsequently be enacted.² But the weight of authority is now to the contrary.³

§ 337a. **Statutes Prohibiting Defense of Suicide.** — In some States statutes exist providing that "it shall be no defense that the assured committed suicide unless it shall be shown to the satisfaction of the court, or jury, trying the cause, that the assured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."⁴ The Supreme Court of the United States has construed the meaning of the words, "committed suicide" as used in this statute as follows:⁵ "But we are of opinion that the word 'suicide' is not used in this statute in its technical and legal sense of self-destruction by a sane person, but according to its popular meaning of death by one's own hand, irrespective of the mental condition of the person committing the act. The result of the construction urged by the defendant would be that, if a perfectly sane man voluntarily and from anger, pride or jealousy, or a mere

¹ *Darrow v. Family Fund Soc.*, *supra*.

² *Supreme Commandery, etc. v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332.

³ *Shipman v. Protected Home Circle*, 174 N. Y. 398; 67 N. E. R. 85. And see *ante*, § 161a.

⁴ 1 Rev. St. of Mo. of 1889, Sec. 5982.

⁵ *Knights Templar, etc., Co. v. Jarman*, 187 U. S. 197; *s. c.* 44 C. C. A. 93; 104 Fed. R. 638.

desire to escape from the ills of life, puts an end to his life, and thereby becomes guilty of the crime of self-murder, and of a fraud upon the insurance company, the company would still be responsible, unless it could be shown that the insured contemplated suicide at the time he made his application for the policy; while, if he committed the same act while insane, and therefore irresponsible, the statute would not apply, and the company would not be liable under the terms of the policy, which provided that it should become void 'in case of the self-destruction of the holder, * * * whether voluntary or involuntary, sane or insane.' In the one case, as we held in *Ritter v. Mutual Life Insurance Co.*,¹ that is, of self-destruction by a sane man, not only would the policy be void, whether there were a provision to that effect or not, but even a contract that it should be valid under such circumstances was thought to be against public policy and subversive of sound morality;² while in the other case of a suicide by an insane person, the insured is guilty of no wrong to the company, if he be incapable of understanding the moral consequences of his own act, and there is no reason in law or morals why the company should not pay. It is impossible to suppose that the legislature could have contemplated such a contingency, and a construction that would lead to this result should be deemed inadmissible, unless the language of the statute were too plain to be misunderstood. The statute was manifestly intended to apply to all cases of self-destruction or suicide, unless the same were contemplated at the time application was made for the policy, and the fact that we may have given a different construction to the same words when used in a policy of insurance does not militate

¹ 169 U. S. 139.

² P. 154.

against this theory. The same words may require a different construction when used in different documents, as, for instance, in a contract, and a statute; and identity of words is not decisive of identity of meaning where they are used in different connections and for different purposes. In a contract, the technical rights of the parties only are involved — in a statute, an important question of public policy. If this statute were read alone and disembarrassed by the construction given to these words in policies of insurance, not a doubt would arise as to its application to all cases of self-destruction; and when we examine the theory of the defendant, and find that it leads to the conclusion that the company would be liable if the insured had committed a fraud upon it, and would not be liable if he had taken his life, though guilty of no fraud, the theory must be rejected without hesitation. The construction we have given to the words ‘committed suicide’ in this act is fortified by reference to sec. 6570, Rev. Stat. Missouri, 1889, referring to the construction of statutes, which provides that ‘words and phrases shall be taken in their plain ordinary and usual sense; but technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import.’ Undoubtedly the word suicide in its usual sense includes all cases of self-destruction.” In the same statute the word, “contemplated,” is equivalent to “intended,” or “resolved,” and refers to a definite purpose not a mere thought.¹

¹ *Ætna L. Ins. Co. v. Florida*, 16 C. C. A. 618; 32 U. S. App. 753; 69 Fed. R. 932; 30 L. R. A. 87; *Christian v. Conn. Mut. L. Ins. Co.*, 143 Mo. 460; 45 S. W. R. 268. See as to exemption of certain classes of companies from this law: *Huff v. Woodmen, etc.*, 833; 85 Mo. A. 96; *Brasfield v. Modern Woodmen*, 88 Mo. App. 208; *Toomey v. Knights of Pythias*, 147 Mo. 129; 48 S. W. R. 936; *Kern v. Leg. of Honor*, 167 Mo. 471; 67 S. W. R. 252; *Logan v. Fidelity & C. Co.*, 146 Mo. 114; 47 S. W. R. 948; *Elliot v. Des Moines, etc., Co.*, 163 Mo. 132; 63 S. W. R. 400; *Haynie v. Knights Templar, etc.*, 139 Mo. 416; 41 S. W. R. 461; *Bras-*

it has been held,¹ that this statute is mandatory and cannot be waived or abrogated by any form of contract or by any device whatever.² The Supreme Court of Pennsylvania has held,³ that the statute of Ohio, providing that, after a company has received a certain number of annual premiums, it shall be estopped from defending against any claim arising upon the policy upon any other ground than fraud, because of any errors, omissions or misstatements in the application, is not a limitation of the company's right to defend on the ground of suicide.

§ 338. **Death at the Hands of Justice.** — Many life insurance policies, contain a condition that they are to be void if the insured die "by the hands of justice" or in "known violation of law." It was held in the celebrated *Fauntleroy's case*⁴ that it is unnecessary to insert a provision of the first kind, because the policy is void in such event upon the grounds of public policy, even though death at the hands of justice were expressly insured against. Death at the hands of justice means, says Chief Justice Tindal, the dying "in consequence of a felony previously committed."⁵ A policy of life insurance does not insure against the legal execution of the insured for crime, even though in fact he may have been innocent, and therefore unjustly convicted and executed.⁶ In this case the court says: "This

field v. Supreme Tent, etc., 92 Mo. App. 102; *McDermott v. Modern Woodmen*, 97 Mo. App. 636; *Shotliff v. Modern Woodmen*, 100 Mo. App. 138; 73 S. W. R. 326; *Morton v. Royal Tribe, etc.*, 93 Mo. App. 78.

¹ *Berry v. Knights Templars, etc., Co.*, 46 Fed. R. 439; affirmed *Knights Templars & Masons, etc., Co. v. Berry*, 1 C. C. A. 561; 50 Fed. R. 511.

² See also *Equitable L. Ass. Soc. v. Pettus*, 140 U. S. 226; 11 S. C. R. 822; affirming *Wall v. Society*, 32 Fed. R. 273. See also *ante*, § 175.

³ *Stark v. Union Central L. Ins. Co.*, 134 Pa. St. 45; 19 Atl. R. 703.

⁴ *Amicable Soc. v. Bolland*, 2 Dow. & C. 1; 4 Bligh (N. S.), 194.

⁵ *Borradale v. Hunter*, 5 M. & G. 639.

⁶ *Burt v. Union Cent. L. Ins. Co.*, 187 U. S. 181; affg. 105 Fed. R. 479; 44 C. C. A. 548; 59 L. R. A. 393.

action can be maintained only on the assumption that there was a failure of justice in the criminal case. It implies a miscarriage of justice. But can there be a contract of insurance against the miscarriage of justice? In the opinion of the court of appeals the question is thus stated and answered: 'Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court not infallible. * * * It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation — litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary, and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires, for error, a new trial of a convicted defendant, but never after his execution. The views thus expressed commend themselves to our judgment. There is a wagering feature in such stipulation which forbids its being incorporated into a policy of insurance, and, if it cannot be formally incor-

porated into the contract, its omission therefrom does not, by implication, give it life and validity.” In a case in North Carolina¹ the policy was on the life of a slave and conditioned to be void if the insured should meet death “by means of invasion, insurrection, riot or civil commotion, or of any military or usurped authority, or by the hands of justice.” The slave was killed in an armed and violent resistance of the authority of an officer and the Supreme Court of that State held that the policy was not avoided.

§ 339. **Death in Violation of Law.** — Unless the contract provides that death while engaged in, or in consequence of, an unlawful act shall avoid the policy, death of the assured while committing a felony is no defense.² Stipulations of this nature are frequent, however, and will be upheld. In a case where the policy was conditioned to be void if the insured should die in consequence of a duel, or of the violation of law,³ the Court of Appeals of New York said: “It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law.” This rule was followed in a later case in the same court⁴ in which the facts were these: Wisner Murray, the insured, and his brother planned an assault upon one Berdell, in pursuance of which the brother seized Berdell by his arms, from behind, and Wisner beat him over the head and face with a rawhide. Berdell drew a pistol and Wisner fled, but was shot and killed by Berdell as he was entering an adjoining room. The court held that whether the discharge of the pistol was intentional or accidental the

¹ *Spruill v. North Carolina, etc., Ins. Co.*, 1 Jones L. 126.

² *McDonald v. Triple Alliance*, 57 Mo. App. 87.

³ *Bradley v. Mut. Ben. Life Ins. Co.*, 45 N. Y. 422.

⁴ *Murray v. New York Life Ins. Co.*, 96 N. Y. 614.

death was the result of the violation of law by Wisner Murray and the policy was held void. So, where the insured was killed while making an unprovoked assault the policy, under a similar condition, was held void.¹ So, under a similar proviso the policy was held void where the insured was killed by his brother while making an assault upon the wife of the latter.² In a case decided by the Supreme Court of the United States³ the policy was to be void if death was caused by "dueling, fighting, or other breach of the law on the part of the insured, or by his willfully exposing himself to any unnecessary danger or peril." The insured and another person were driving sulkies in competition alongside of each other at a horse-race for money, such race being illegal by statute, and on a collision occurring, the insured jumped to the ground from his sulky, and was clear from the sulky reins and harness, on his feet and uninjured, and spoke instantly to his horse to stop, and then started forward to get hold of the reins, which were hanging across the axle-tree. When he had hold, or was attempting to get hold of them he was tangled in them, and falling down was dragged along the ground and striking a stone violently with his head was killed. The court held that no recovery could be had on the policy. It was claimed that the death was caused by a new force or cause; but Judge Miller, in delivering the opinion of the court, said: "But we do not think this new force or cause is sufficiently made out by this verdict. The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver, are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to

¹ Wolff v. Com. Mut. Life Ins. Co., 5 Mo. App. 236.

² Bloom v. Franklin Life Ins. Co., 97 Ind. 478.

³ Ins. Co. v. Seaver, 19 Wall. 531.

which the disaster should be attributed. If he had been landed safely from his sulky and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit when the race was lost, might have been too remote to bring the case within the exception. But as the finding presents it, we cannot say that the accident was not caused by the race, which was itself a violation of the law, and which might still have gone on had he caught his mare in time." But where the insured was killed by the husband of the woman with whom he had immediately before committed adultery, the Supreme Court of New York¹ held that it could not be said that the insured died in the violation of law, because the killing was not done while the insured was in the act of adultery, nor in the defense of person or property, and therefore was a crime and not a natural and legitimate effect of the act of adultery. And where the condition was that the policy should be void if the assured should die "in the known violation of any law of this State," the Supreme Court of Missouri² held that under this clause the policy would not be avoided, if the insured was killed after retreating from an altercation which he had commenced, under circumstances which would make the slayer guilty of felonious homicide. The facts were that one Coryell was talking to a man, Wilson, near the store of a brother of Harper, the insured. The deceased spoke to Wilson and asked him if he knew to whom he was talking and to keep his hand on his pocket. Coryell inquired if that insult was intended for him and Harper said it was. The parties then quarreled, the deceased drew a single barreled pistol and snapped it at Coryell who thereupon drew a revolver and advanced on Harper, who threw his

¹ *Goetzman v. Conn. Mut. L. Ins. Co.*, 3 Hun, 515; 5 N. Y. St. R. 572.

² *Harper v. Phoenix Ins. Co.*, 19 Mo. 506; 18 Mo. 109.

pistol and struck Coryell and retreated into the store. Coryell shot and missed him while he was in the store. Then the deceased retreated under a stairway and picked up a stick of wood which he raised in a threatening position over his head, but did not advance on Coryell, nor attempt to use the stick in any other manner. Coryell then fired again and killed the deceased. The whole difficulty was one continuous quarrel. The court said that life insurance companies take the subject insured with his flesh, blood and passions and that "the dangers to which the lives of men are exposed from sudden ebullitions of feeling, are a lawful matter of insurance." It concluded: "The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact, set up as a bar, that Coryell slew Harper in self-defense. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. His having a stick of wood in his hand at the time he was slain did not, in the least, extenuate the guilt of Coryell. Under the circumstances Harper would have been justified had he slain Coryell. * * *

Now, if one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is, thereby, guilty of a felony, is it not a gross perversion of language to say that that person died in the known violation of a law of the land?"¹ A series of interesting decisions upon the question were given in suits brought upon policies upon the life of one Cluff, which were conditioned to be void if the insured should die "in the known violation of any law of this State or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to

¹ This rule was again affirmed in *Overton v. St. Louis Mut. L. Ins. Co.*, 39 Mo. 122.

visit or reside in.” Cluff was killed in Louisiana by one Cox. The father of the latter owed Cluff a debt and Cluff meeting the son driving a wagon and horses asked him if they were going to move. The reply was yes. He then asked when they were going to pay his debt; the son said they were not going to pay it at all. The deceased then seized the horses and began to unhitch them. The testimony was conflicting whether the boy and Cluff had a scuffle and blows, after which the boy started to the house and then turned about and shot, or whether the boy got off of the wagon and after some talk started to go to the house and then turned and fired, but it was agreed that he ran about three rods, drew a pistol and fired, killing Cluff. One suit was brought in Massachusetts¹ and four trials were had. Upon the first trial it was held as a matter of law that upon the evidence the plaintiff must recover. This was reversed by the Supreme Court,² the court holding that the jury were to say whether the insured, when he was shot, was engaged in a criminal violation of law, known by him to be so, and that such violation might have been reasonably expected to expose him to violence which might endanger life. On a second trial the jury on the same evidence found for the plaintiff. On appeal the Supreme Court held³ that the company must prove, in order to avoid the policy on this ground, that the insured died while engaged in a voluntary criminal act, known by him at the time to be a crime against the laws of such State or country. That those acts which are criminal by the common law and the laws of all civilized countries will be presumed to be criminal by the laws of the States of the Union and he will be presumed to have known that they are so. If there is evidence

¹ *Cluff v. Mut. Benefit L. Ins. Co.*, 13 Allen, 308; 99 Mass. 317.

² 13 Allen, 308, *supra*.

³ 13 Allen, 308, *supra*.

tending to show that the insured was killed by being shot while engaged in the commission of a robbery, and assault and battery, and it is in dispute, whether, if he had been so engaged, he had desisted therefrom, it must appear, in order to exonerate the company from liability, that such criminal act was not so far completed as to render the shooting a new and distinct event, rather than a mere continuation of the original affray, and that the death was in consequence of the crime of the insured; but it need not be proved that the insured knew or had reason to believe that his criminal act would or might expose his life to danger. On the third trial the jury also found for plaintiff, but the Supreme Court held¹ that instructions were erroneous which permitted the jury to understand that the policy was not avoided, although the insured was killed while doing what would constitute either robbery or larceny, if he acted under a belief which would avoid the otherwise criminal character of his acts, and that such a belief need not be a belief in his legal right to do the acts, but might be a belief in a right of self-redress by reason of the disturbed condition of the country, the inefficient administration of the laws, or otherwise. Upon an appeal after a fourth trial, in which a verdict was again found for plaintiff,² the Supreme Court held that the fact that the judge did not comply with a request to instruct the jury that the insured must be presumed to have known the civil law of the State where he was killed was not a valid ground of exception, if he did instruct them that the insured had no right to do the acts in the commission of which he was killed, and that he must be presumed to have known the criminal laws of the State. In the opinion the court says: "The judge having stated to the jury that

¹ 99 Mass. 317.

² 99 Mass. 317, *supra*.

Cluff had no right to take the property, the material question to be submitted to them on this point was, whether he took it with a felonious intent, and not whether he took it with a knowledge that he was violating the civil law of the State.” The court, in these cases, held that the proviso must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespass against property or infringements of civil laws to which no criminal consequences are attached. This conclusion was based upon the natural words of the import “known violation of law” and upon their being found immediately following the words “by the hands of justice.” In this view the court agrees with the doctrine of *Harper v. Phoenix Ins. Co.*¹ Suit was subsequently brought in New York upon another policy issued by the same company upon the same life, and, upon substantially the same evidence as presented in Massachusetts, the lower court ordered judgment in favor of the defendant. The Supreme Court affirmed this ruling, but the Court of Appeals reversed it,² the majority of the court holding that it was error not to allow the jury to pass upon the question whether the death of the insured was caused by a known violation of law upon his part, and whether the act of the deceased which produced the death was a natural, reasonable or legitimate consequence of the act of the insured. The majority of the court inclined to following the reasoning of the Massachusetts cases, holding that the proviso did not extend to mere trespasses. The opinion concludes thus: “It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or

¹ 19 Mo. 506, *supra*.

² *Bradley v. Mutual Benefit L. Ins. Co.*, 45 N. Y. 422.

other trivial trespass, the case would fall within the proviso, for no one would hesitate to say, that in the case supposed, the unlawful act of the deceased was a totally inadequate cause for the killing. Yet between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases involving different degrees of provocation which cannot be measured so as to determine, as matter of law, their adequacy to produce a fatal result; and it can hardly be laid down as a rule of law, that an attempt to take one's horses for debt, without process, but without any threat of personal violence, is of itself an adequate cause for intentionally killing the offender, and that a killing during or immediately after such an attempt, must necessarily be held a legitimate consequence of the act. Such an act may lead to violence, and if any act of violence of the character which would naturally be resorted to, as a measure of resistance, should result in death, the necessary connection between the original illegal act, and the death, might be established. But the intentional killing of another with a deadly weapon under such circumstances, is a totally different affair, and cannot be held as matter of law, to be a natural or reasonable result or consequence of the original offense." The minority of the court dissented from these views, holding that "when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to his life, the case comes within the proviso." In a comparatively recent case in Indiana,¹ the Supreme Court of that State disapproved the doctrine of the Massachusetts' court in the Cluff case and approved that laid down by the dissenting judges in the New York case as above, holding that death in the known violation of any law criminal or civil would make the

¹ Bloom v. Franklin L. Ins. Co., 97 Ind. 487, *supra*.

policy inoperative. "In our opinion," says the court, "the law is this: A known violation of a positive law whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequence of the act does not increase the risk." The cases all agree that the wrongful act must have been the proximate cause of the death. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred, so that without its commission it would not have taken place. Whether the violation of law was the proximate cause of death and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must be some causative connection between the act which constituted the violation of law and the death of the insured.¹ If the policy provides that it shall be void if the insured "die while violating any law," it has been held that the death must occur at the time of the criminal act, not after.² In this case the assured robbed the State treasurer and while leaving the building was killed by a policeman. The court held that the words meant death in the actual violation of law, and that in this case as the act had been completed, and the death occurred afterwards, there was no forfeiture. Where the policy was to be void if death happened "while engaged in or in consequence of any

¹ *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; *Cluff v. Mut. Ben. L. Ins. Co.*, 13 Allen, 308; 99 Mass. 817; *Bradley v. Mut. Ben. L. Ins. Co.*, 45 N. Y. 412; 3 Lans. 341; *Murray v. New York L. Ins. Co.*, 96 N. Y. 614; *Ins. Co. v. Seaver*, 19 Wall. 531; *Haley v. Prudential Ins. Co.*, 189 Ill. 317; 59 N. E. R. 545; affg. 91 Ill. App. 363; *Davis v. Modern Woodmen*, 98 Mo. App. 713; 73 S. W. R. 923.

² *Griffin v. Western Mut. B. Assn.*, 20 Neb. 620; 31 N. W. Rep. 122. See *Prudential Ins. Co. v. Higbee (Ky.)*, 57 S. W. R. 614; 22 Ky. L. R. 495.

unlawful act," it was held that it cannot be said as a matter of law that if a soldier, insured thereunder, deserts and is shot, as alleged, in self-defense, by a police officer who is attempting to arrest him, he meets death while engaged in an unlawful act.¹ The fact that the assured commits suicide is no defense to an action on a policy conditioned to be void if the assured should die in violation of, or attempt to violate any criminal law of the State, as in New York suicide is not a crime but only the attempt to commit suicide,² and generally suicide is not a violation of law.³ Where a man lay in wait for another and an affray resulted in his death, such facts do not show a "duel."⁴ The meaning of the phrase "violation of any criminal law," as used in a by-law of a society, providing for the forfeiture if the member should lose his life, while engaged in such act, is that the assured must lose his life while engaged in the commission of a felony.⁵

§ 340. **Where Recovery is Precluded because of Public Policy.**—Recovery on a life insurance is often precluded because of public policy. As where the insured was executed for crime.⁶ In a case in Massachusetts the insured voluntarily, and without any justifiable medical reason, submitted herself to an illegal operation with intent to cause

¹ *Utter v. Travelers' Ins. Co.* 65 Mich. 545; 33 N. W. Rep. 812; *Supreme Lodge, etc. v. Beck*, 181 U. S. 49; affg. 36 C. C. A. 677; 94 Fed. R. 751. And the question may be one for the jury. *Payne v. Union Life Guards (Mich.)*, 99 N. W. R. 376.

² *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 22 N. E. R. 1093; affg. 42 Hun, 245; *Meacham v. N. Y. State, etc., Assn.*, 120 N. Y. 237; affg. 49 Hun, 363.

³ *Kerr v. Minn. Ben. Assn.*, 39 Minn. 174; 39 N. W. R. 312; *Patrick v. Insurance Co.*, 67 Barb. 202; *Royal Circle, etc. v. Achaterrath*, 204 Ill. 549; 68 N. E. R. 492.

⁴ *Davis v. Modern Woodmen*, *supra*.

⁵ *Brown v. Supreme Lodge K. of P.*, 83 Mo. App. 633.

⁶ *Burt v. Union Cent. L. Ins. Co.*, 187 U. S. 362; affg. 44 C. C. A. 548; 105 Fed. R. 419; 59 L. R. A. 393. See *ante*, § 338.

an abortion and died from the consequences of the miscarriage thereby effected. The court held that there could be no recovery on the ground of public policy,¹ saying: "No recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under, or in consequence of an illegal operation for abortion, would be contrary to public policy, and could not be enforced in the courts of this commonwealth."² Proof that the beneficiary feloniously caused the death of the assured will defeat a recovery on the policy,³ but it is no defense in an action on a policy by the executors that the insured died from a dose of poison administered by the wife, although it would be in an action by the assignee of the wife, she being the beneficiary.⁴ If an insane beneficiary kills the insured such act does not avoid the policy.⁵ Nor does the murder of the member of a benefit society by the beneficiary avoid the certificate as

¹ *Hatch v. Mutual B. Life Ins. Co.*, 120 Mass. 550. See also *Wells v. N. W. Mut. L. Ins. Co.*, 194 Pa. St. 207; 43 Atl. R. 126.

² The court cites *Amicable Society v. Bolland*, 4 Bligh (N. S.), 194; *Horn v. Anglo-Australian Ass. Co.*, 30 L. J. (N. S.), Ch. 511; *Moore v. Woolsey*, 4 E. & B. 243.

³ *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591; 6 S. C. R. 877; *Schreiner v. Ill. Cath., etc., Soc.*, 35 Ill. App. 576.

⁴ *Cleaver v. Mut. Fund L. Assn. (Eng. Ct. App.)*, 8 Times L. R. 139; reversing 7 Times L. R. 677. See also *Schmidt v. Northern L. Assn.*, 112 Ia. 41; 83 N. W. R. 800; 51 L. R. A. 141. The murder of the insured by the assignee of a life insurance policy, whose claim is only valid to the extent of reimbursement of the premiums paid, forfeits only the assignee's part of the insurance, and the estate of the insured can recover the residue. *New York Life Ins. Co. v. Davis*, 96 Va. 737; 32 S. E. R. 475; 44 L. R. A. 305.

⁵ *Holdom v. Grand Lodge, etc.*, 159 Ill. 619; 43 N. E. R. 772; 31 L. R. A. 67.

her rights only are forfeited, and there is a resulting trust for those who would take if there was no designation.¹

§ 340a. **Defense of Fraud: Incontestable Clause.**—Policies taken out by fraud, as with the intention to commit suicide, are void;² and so is a policy secured by fraudulent connivance of the agent,³ and evidence of other insurance obtained at the same time is admissible.⁴ To establish the defense of fraud it is necessary not only to show the fraud alleged but that defendant was thereby deceived, and in reliance upon the truth of the misrepresentations, issued the policy which it seeks to avoid. To establish such evidentiary fact of bad faith, falsehood, or deception, it has been held that the proof must be clear, satisfactory and convincing.⁵ The policy may stipulate that it shall be incontestable after a certain length of time or payment of a certain number of premiums, in which case even the defense of fraud is precluded.⁶ Sometimes fraud is expressly excepted from such agreement.⁷ Usually the provision is that the policy shall be incontestable after a certain number of annual premiums have been paid, or after a certain period. This provision has been generally upheld, although where there is a general provision as to incontestability the defense of fraud may still be made. In

¹ Supreme Lodge, etc. v. Menkhausen (Ill.), 70 N. E. R. 567.

² Smith v. National Ben. Assn., 123 N. Y. 85; 25 N. E. R. 197.

³ Fisher v. Metropolitan L. Ins. Co., 160 Mass. 386; 35 N. E. 849.

⁴ Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591; Smith v. National Ben. Assn., *supra*; Whitmore v. Supreme L. K. & L. of H., 100 Mo. 36; 13 S. W. R. 495.

⁵ Ley v. Metropolitan L. Ins. Co., 120 Ia. 203; 94 N. W. R. 568; and the cases there cited.

⁶ Wright v. Mut. Ben. L. Assn., 118 N. Y. 237; 23 N. E. R. 186; affg. 43 Hun, 61; Mass. Ben. L. Assn. v. Robinson, 104 Ga. 256; 30 S. E. R. 918; 42 L. R. A. 261; Simpson v. N. Y. Life Ins. Co., 115 N. C. 393; 20 S. E. R. 517; Teeter v. United L. Assn., 159 N. Y. 411; 54 N. E. R. 72; affg. 11 App. Div. 259; 42 N. Y. Supp. 119.

⁷ Holland v. Supreme Council, etc., 54 N. J. L. 490.

§ 340a CONDITIONS WHICH AVOID THE RIGHT.

a case of this kind¹ the court said: "Another, and probably more conclusive, reason why this defense may be asserted, is that fraud vitiates every contract into which it enters. In Bliss on Insurance,² it is said: "An agreement that an insurer will not raise any objection, even in the case of direct personal fraud, is a void condition. It has even been questioned whether it would not be sufficient to render the policy itself wholly void *ab initio*, as an illegal contract. In these cases, then fraud, if not mentioned, must be assumed to be excluded, since that construction is always to be preferred which will support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation where a lawful meaning can be given to their words. Of course, this construction cannot make the policy really indisputable, for it leaves open the question whether the statement or omission complained of was fraudulent or not, and also what is the true meaning or construction of the policy itself. This statement of the law is fully supported in all of a large number of cases which have been examined and disputed in none. There are cases wherein the policy provided that it should be incontestable for any cause, or for certain causes, after a specified length of time, and others providing that the policy should be incontestable after the death of the assured. Such provisions are held to be in the nature of a statute of limitation or repose, and that, as the parties may stipulate as to the time when action may be brought, so they may stipulate as to the time within which certain defenses may be asserted. Such stipulation did not condone the fraud, but limited the insurer to a time within which it might assert the fraud as against the contract. In these cases the right to defend on the ground of

¹ Welch v. Union Cent. L. Ins. Co., 108 Ia. 224; 78 N. W. R. 853; 50 L. R. A. 774.

² § 247.

fraud within the time agreed upon is recognized.” Where the policy is to become incontestable after a certain period the provision has been held to be in effect a short statute of limitations. In one case¹ it was said that the clause was uncertain and of doubtful meaning. We give a few extracts from leading cases to show what construction is given by the courts to such a provision. In discussing the subject the Court of Errors and Appeals of New Jersey has said:² “To meet the defense in this case the plaintiff’s counsel contended that the benefit certificate was incontestable, in the hands of the beneficiary named in it, unless the member had been suspended during his lifetime and his death occurred during his suspension. This contention was rested upon a stipulation in the deceased’s application for beneficial membership, which follows his agreement to pay dues and assessments, and is in these words, viz.: ‘I further agree that any untrue or fraudulent statement made or any concealment of facts by me in this application, or my suspension or expulsion from or voluntarily severing my connection with the order, shall forfeit my rights to all benefits and privileges therein; and it shall not be lawful, in case of my death during such suspension, for any of my beneficiaries, heirs, or their or my representatives, to receive any benefit whatever from the supreme or any grand or subordinate council of Chosen Friends; and in case of expulsion or voluntary withdrawal from the order, I hereby renounce for myself, my heirs and representatives, all the benefits granted by said order.’ Wright v. Asso-

¹ Franklin L. Ins. Co. v. Villeneuve, 25 Tex. C. A. 356; 60 S. W. R. 1014.

² Wood v. Dwaris, 11 Exch. 493; Wheelton v. Hardesty, 8 El. & Bl. 232; Kline v. National Ben. Assn., 111 Ind. 462; 11 N. E. R. 620; Wright v. Mut. Ben. Assn., 43 Hun, 61. See also *ante*, §§ 216a, 235b, and *post*, § 503.

ciation¹ was cited to sustain this position. In that case the certificate of membership contained a provision that if any misrepresentation or fraudulent or untrue answer or statement has been made, or if any fact which should have been stated to the association be suppressed, the agreement of assurance shall be void. The applicant also warranted the truth of his statements in his application. But the certificate as issued contained the provision that no question as to the validity of an application or certificate of membership shall be raised unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named. The member died within the two years and the suit was brought by the assignee of the beneficiary named in the certificate, who took the assignment for value. The court held that the stipulation just referred to served a similar purpose as statutes of limitation and repose; that it was not a stipulation absolutely to waive all defenses and condone fraud, but provided ample time and opportunity within which they may, and beyond which they may not, be set up. On this construction the court decided that the defense of fraud and fraudulent representations in procuring the certificate could not be set up. In the New York case the stipulation that no question as to the validity of the policy should be raised after the death of the member was in the certificate, which was the evidence of the company's contract, and was precise and explicit and explained in plain and unambiguous terms a contract to that effect, binding upon the company. In this case the paragraph in question is found only in the application, which was the act of the applicant, and in its language imports only an agreement on his part, and no language or terms are found in it of like import with that under

¹ 118 N. Y. 237; 23 N. E. Rep. 186.

consideration in the New York case. Nor did the defendant require the aid of this stipulation to perfect its defense to this suit. By section 4 of article 1 of the relief-fund laws, persons engaged in the occupation in which the applicant was employed when his application was made were expressly excluded from beneficial membership. The false and fraudulent representations by means of which he obtained a membership from which he was excluded by those laws are contained in his statement to the medical examiner, as well as in his application; and having by these fraudulent means, as was said by the chief justice in the *McVey* case, 'misled the society into making this obligation, such obligation is void by force of ordinary legal principles.' The relief fund is raised by assessments on beneficiary members for the benefit of members of that class to provide means to pay the just claims of those members whose certificates are a charge upon the fund. These certificates are not for the payment of a specified sum of money but are simply vouchers that the holder is entitled to a benefit not exceeding a certain sum, to be paid in the manner and subject to the conditions set forth in the laws governing the relief fund. The amount realized upon such a certificate when matured, depends upon the condition of that fund. A claim fraudulently foisted upon the relief fund by one member, in violation of the fundamental articles in the constitution of the order, is a fraud upon his associates. The proof in this case was plenary that this certificate was obtained by positive fraud, of such a character as ought, in morals as well as in law, to defeat the fraudulent purpose, and such must be the result, on well-settled legal principles, unless the fraud be sheltered behind some barrier which the association itself has provided. The stipulation upheld in *Wood v. Dwaris*,¹ and approved in *Wheulton v.*

¹ 11 Exch. 493.

Hardisty,¹ was that the policy should be indisputable except in cases of fraud. The stipulation in *Kline v. Association*,² giving to the certificate the quality of incontestability, also excluded cases of fraud. The agreement in *Wright v. Association* has been set out above. Courts incline strongly in favor of a liberal construction of stipulations which save contracts of insurance from forfeiture, but the judicial inclination is equally strong against contracts procured by fraudulent practices, without considering the question whether an agreement having the effect to constrain a party to abide by a contract procured from him by fraud and deception will receive any legal countenance where such an agreement is part of the very contract which is tainted with fraud. I think it is clear that an agreement which shall be conceded that effect must be expressed in terms that are clear and unambiguous. There is no agreement by the association to that effect in this case, and I fail to comprehend on what principle the agreement by the assured, contained in his application, can be made available to conclude the association from repudiating a membership from which the deceased was debarred by the relief-fund laws of the order, and the certificate for benefits which was issuable only to a qualified member, when both the membership and the certificate were obtained by fraud and deception." The Supreme Court of Rhode Island thus reviews the authorities: ³ "The stipulation in the contract sued on is that 'this policy shall be incontestable after two years from the date of its issue, provided the premiums are paid as agreed.' This is not an absolute stipulation to waive all defenses and to condone fraud. 'On the contrary,' as said by the court in *Wright v. Mutual Ben.*

¹ 3 El. & Bl. 232.

² 111 Ind. 462; 11 N. E. R. 620.

³ *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524; 48 Atl. R. 300; 53 L. R. A. 742.

Life Asso.¹ ‘it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose as, statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds.’ That the parties to a contract may stipulate for a shorter period of limitation than that provided by law as to all matters which might in the absence of such stipulation be set up in avoidance of the contract, would seem to be entirely reasonable; and such is the well-settled rule of law. Such an agreement is neither expressly nor impliedly prohibited by our statutes of limitations, and is consistent with the policy upon which the statutes of limitations are founded.² The practical, and evidently the intended, effect of the stipulation in question, was to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. It has repeatedly been held that an agreement limiting the time within which an action may be brought upon a policy of insurance is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed.³ And, as said by the court in *Clement v. New York L. Ins. Co.*,⁴ ‘if this be so it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts.’ That the company holds out the special provision in question as an inducement to people to insure, and also that it is very effectual in accomplishing that object, no one can, for a moment, doubt. It clearly gives everyone to understand that, no matter what mistakes may be made in the answers to the numerous

¹ 118 N. Y. 237; 6 L. R. A. 731; 23 N. E. 186.

² *Wilkinson v. First Nat. F. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166.

³ 2 May Ins., 4th ed., sec. 478, and cases cited in note; 11 Am. & Eng. Enc. L. w, pp. 349, 350.

⁴ 101 Tenn. 28; 42 L. R. A. 247; 46 S. W. R. 561.

questions propounded in the application, which answers are declared therein to be warranties, no advantage can be taken thereof by the company after the expiration of the time limited in the agreement; that his rights under the policy and the rights of those in whose favor it is drawn will then become absolute; and that the beneficiary, after the death of the insured, and perhaps long after the death of all those who knew the facts relating to the transaction, will not be forced into a lawsuit to determine whether the policy ever had any legal force or validity. The insertion of said clause in the policy of the company is virtually saying to the insured: 'We will take two years in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the policy; and if, within that period, we cannot detect any such falsity or fraud, we will obligate ourselves to make no further inquiry, and to make no defense on account of them.' To hold the company bound by such an undertaking is not to violate any rule of public policy, but is simply to compel it to fulfill its plain and deliberately assumed obligation. In *Massachusetts Ben. Life Asso. v. Robinson*,¹ the law is very satisfactorily stated in the following language: 'Where parties enter into a contract which from its nature affords an opportunity to one party to perpetrate a fraud upon another, and it is stipulated therein that the party who is liable to be defrauded shall have a specified time in which to make inquiry as to the acts and conduct of the other party, he is on notice, by the very terms of the contract itself, that fraud may be involved in it, and the duty is upon him to commence at once an investigation into the acts, conduct, and representations of the other party; and if the time fixed is such that the information which would show that the fraud had been perpetrated could have been, by the exercise of ordinary diligence, obtained, then the parties are bound by their

¹ 104 Ga. 256; 42 L. R. A. 261; 30 S. E. 918.

contract as to time, and after the lapse of that time fraud is no longer a defense. This does not violate in any way the well-settled principle that fraud is to be abhorred, vitiates everything it touches, and the person guilty of it is not to be contemned in any way by the courts. While all this is true, it is equally well settled that a contract which has for its foundation a willful fraud may become vitalized and enforceable by the negligence of the party who was the victim of the fraud.' An examination of the reported cases bearing upon the question at issue, from that of *Wood v. Dwarris*,¹ decided in 1856, which appears to be the earliest one, down to the present time, shows that there is a practical unanimity of opinion in the courts in support of the position taken by the plaintiff in this case; and, as the law as declared in said cases meets with our entire approval there is no occasion for a further discussion of the question involved.''² This clause shuts out the defense of suicide,³ or death from a criminal act.⁴ The clause does not apply to the defense that the suit is not brought within the period limited by the policy;⁵ and does not preclude the defense of want of insurable interest.⁶

¹ 11 Exch. 493.

² See *Wright v. Mutual Ben. Life Asso.*, 43 Hun, 61; *Patterson v. Natural Premium Mut. L. Ins. Co.*, 100 Wis. 118; 42 L. R. A. 253; 75 N. W. 890; *Clement v. New York L. Ins. Co.*, 101 Tenn. 22; 42 L. R. A. 247; 46 S. W. 561; *Kline v. National Ben. Asso.*, 111 Ind. 462; 11 N. E. 620; *Mareck v. Mutual Reserve Fund Life Asso.*, 62 Minn. 39; 64 N. W. 68.

³ *Patterson v. Natural Premium L. Ins. Co.*, 100 Wis. 118; 75 N. W. R. 980; 42 L. R. A. 253; *Royal Circle v. Achterrath*, 204 Ill. 549; 68 N. E. R. 492; *Mutual Reserve F. L. A. v. Payne* (Tex. Civ. A.), 32 S. W. R. 1063; *Goodwin v. Provident Savings L. A. Soc.*, 97 Ia. 226; 66 N. W. R. 157; 32 L. R. A. 473; *Marek v. Mut. Res. F. L. Assn.*, 62 Minn. 39; 64 N. W. R. 68.

⁴ *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408; 56 S. W. R. 668.

⁵ *Brady v. Prudential Ins. Co.*, 168 Pa. St. 645; 32 Atl. R. 102.

⁶ *Clement v. New York L. Ins. Co.*, 101 Tenn. 22; 46 S. W. R. 561; 42 L. R. A. 247; *Mfrs. L. Ins. Co. v. Anctil*, 28 Can. S. C. 103; *Union Cent. L. Ins. Co. v. Fox*, 106 Tenn. 347; 67 S. W. R. 62.

CHAPTER XI.

PREMIUM, ASSESSMENTS AND DUES.

- § 350. The Consideration of a Life Insurance Contract is called Premiums or Assessments.
- 351. All the Premiums the Consideration: Insurance Contract not one from Year to Year.
- 352. Non-payment of Premium will not Effect a Forfeiture unless so Stipulated.
- 353. Policy does not Attach until First Premium is Paid if the Contract so Provides.
- 354. Time of Payment of Premium is of the Essence of the Contract.
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- 386. To Whom Money Collected on an Assessment Belongs.
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- 389. Dues.

§ 350. **The Consideration of a Life Insurance Contract is Called Premiums or Assessments.**—The consideration of a contract of life insurance is usually called premiums when paid to the ordinary life insurance companies and assessments when paid to mutual beneficiary societies. Neither the name given to this consideration nor the time of its payment, either in one sum, or annually, or upon the uncertain times of the deaths of the members of the society, affect the validity of the contract or make it any less one of insurance.¹ Nor can we see any reason why different rules should govern the payment of premium to regular companies from those that apply to the assessments of the benevolent orders, except so far as affected by the terms of the agreement between the parties. The contracts of the companies and those of the orders have substantial

¹ *Ante*, § 162.

elements of similarity, and the same principles should be applied to both wherever practicable. The payment of the consideration is an important condition in all contracts of life insurance and the subject merits careful examination.

§ 351. **All the Premiums the Consideration: Insurance Contract not one from Year to Year.** — There is a want of harmony in the authorities as to the real nature of the contract of life insurance in respect to the consideration. For example, the Supreme Court of Connecticut says:¹ “A contract of life insurance is a peculiar contract. It has no parallel and few analogies in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of the annual premiums, consists of two parts and is divisible. The applicant upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference continued, as it is supposed it will be, from year to year during life, may be regarded as the consideration for the right to continue the insurance. * * * The defendants for a valuable consideration, made an irrevocable proposition to insure the applicant during life upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted he was to comply with the condition and pay the premium on or before a given day. * * * We regard the payment of the premiums as a condition precedent to any subsequent liability on the part of the defendants.” On

¹ *Worthington v. Charter Oak Life Insurance Co.*, 41 Conn. 399.

the other hand the better rule has been laid down by the majority of the Supreme Court of the United States as follows:¹ "The contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, — as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the life assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance."² The payment

¹ *New York L. Ins. Co. v. Statham*, 93 U. S. 24. See also *Thum v. Wolstenholme*, 21 Utah, 446; 61 Pac. 537.

² *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 469; *McDougall v. Provident M. L. Ass. Soc.*,

of a premium in either case operates merely to continue the old contract.¹

§ 352. **Non-payment of Premium will not Affect a Forfeiture Unless so Stipulated.** — The parties to a contract of insurance are free to insert in it whatever conditions they please, provided there be nothing in them contrary to the common or statute law or public policy,² and consequently they may agree that the policy shall be forfeited for non-payment of premium at the appointed day. But, in the absence of any stipulation so providing, the non-payment of a premium will not effect a forfeiture,³ as where the policy provided that in case of non-payment of premium, within four weeks after the same was payable, the company should be at liberty to cancel it.⁴ The question of forfeiture arises oftener in cases where premium notes are given, and then the effect of non-payment has been uncertain under varying provisions of the contract, and will be considered under that division of the subject.⁵ While all the cases show that the courts construe provisions for forfeiture for non-payment of premium strictly, so as to

19 N. Y. Supp. 481; *Richardson v. Mutual L. Ins. Co.* (Ky.), 18 S. W. R. 165; *Ins. Co. v. Griggsby*, 10 Bush, 310.

¹ *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, and cases cited. See for construction of policy providing for quarterly premiums: *McConnell v. Provident S. L. Ass. Soc.*, 34 C. C. A. 663; 92 Fed. 769; *Goodwin v. Provident S. L. Ass. Soc.*, 97 Ill. 226; 66 N. W. R. 157; 32 L. R. A. 473; *Nall v. Provident S. L. Ass. Soc.* (Tenn. Ch. App.), 54 S. W. R. 109. See also *post*, § 356.

² *Beadle v. Chenango Mut. Ins. Co.*, 3 Hill (N. Y.), 161.

³ *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones L. 558; *American Ins. Co. v. Klink*, 65 Mo. 78; *Swander v. Northern, etc., Co.*, 25 Ohio Cir. Ct. 3.

⁴ *Brady v. Prudential Ins. Co.* (N. Y. Com. Pl.), 29 N. Y. Supp. 44; citing *Scheu v. Grand Lodge, etc.*, 17 Fed. R. 214.

⁵ *Post*, § 372.

prevent forfeiture if possible, they nevertheless uphold the contract and enforce it.¹

§ 353. Policy does not Attach Until First Premium is Paid if Contract so Provides. — By signing the application and accepting the policy the insured is deemed to have had notice of, understood and agreed to the terms, limitations and conditions contained in the application and the policy, and if the latter provides that it shall not take effect until the advance premium is paid during the lifetime of the assured, then, unless such payment is made, the policy does not attach and the delivery of the receipt without payment avails nothing.² Such payment is a condition precedent that must be complied with.³ Delivery of the policy by an agent contrary to instructions and by mistake will not make the company liable.⁴ If, however, the custom of the agents to give credit was known and acquiesced in, by the receipt of such premium after the time, the company will be taken to have waived the requirement,⁵ and a general agent has power to waive this condition.⁶ Acceptance of a note for the premium, or other act showing an intent to put the contract in force, will bind the company.⁷ But if a note is taken for the first premium but afterwards at request of

¹ *Ala. Gold L. Ins. Co. v. Thomas*, 84 Ala. 578; *Mound City M. L. Ins. Co. v. Twining*, 12 Kan. 475.

² *Brown v. Insurance Co.*, 59 N. H. 298; *Ormond v. Mut. L. Assn.*, 96 N. C. 158; 1 S. E. Rep. 796; *Davis v. Mass. M. L. Ins. Co.*, 13 Blatchf. 462. See *ante*, § 272.

³ *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585; 87 N. W. R. 331.

⁴ *Charter Oak L. Ins. Co. v. Smith*, 3 Cin. L. Bul. 607.

⁵ *Tennant v. Travelers' L. Ins. Co.*, 31 Fed. Rep. 322; *Miller v. Life Ins. Co.*, 12 Wall. 285.

⁶ *O'Brien v. Union Mut. L. Ins. Co.* 22 Fed. Rep. 586; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; *Goit v. National Protection Ins. Co.*, 25 Barb. 189.

⁷ *Krause v. Equitable, etc., Soc.*, 99 Mich. 461; 58 N. W. R. 496; *Trundle v. Provident Sav., etc., Soc.*, 54 Mo. App. 188.

the maker surrendered the policy is not in force.¹ The question of delivery may be one for the jury.² But where the receipt of premium is acknowledged in the policy the insurers will not be heard to deny the fact, unless they can show that the acknowledgment was made by fraud, error or duress.³ It has been held that payment of the first premium and acceptance of the policy is a personal act and so, if a policy provide that it shall not take effect "until the advance premium shall have been paid during the lifetime of the person whose life is hereby insured," a payment of such premium by a third person, without the knowledge of the assured, is or no effect, although made with his money; and his administrator cannot ratify the act.⁴

§ 354. Time of Payment of Premium is of the Essence of the Contract. — In life insurance contracts, if the policy is conditioned to be void if the stipulated premium be not paid at the appointed day, time is of the essence of the contract and if the premium be not paid the policy is void unless the condition be waived.⁵ A beneficiary takes the

¹ Griffith v. N. Y. Life Ins. Co., 101 Cal. 627; 36 Pac. R. 113.

² Coffin v. New York L. Ins. Co., 127 Fed. R. 555.

³ Michael v. Mut. Ins. Co., 10 La. Ann. 737; Ill. Cent. Ins. Co. v. Wolf, 87 Ill. 354; Teutonia L. Ins. Co. v. Mueller, 77 Ill. 22; Consolidated, etc., Ins. Co., Cashow, 41 Md. 59; Goit v. National Protection, etc., Ins. Co., 25 Barb. 189; Kline v. National Ben. Assn., 111 Ind. 462; 11 N. E. R. 620; Troy F. Ins. Co. v. Carpenter, 4 Wis. 20; Madison Ins. Co. v. Fellowes, 1 Disn. 217; 2 Disn. 128; Basch v. Humboldt, etc., Ins. Co., 35 N. J. 429; Calhoun v. Union Mut. L. Ins. Co., 3 Pugs. & B. (N. B.) 13.

⁴ Whiting v. Mass. Mut. L. Ins. Co., 129 Mass. 240; citing Hoyt v. Mut. Ben. L. Ins. Co., 98 Mass. 539; Markey v. Mut. Ben. L. Ins. Co., 103 Mass. 78; Badger v. American Ins. Co., 103 Mass. 244; Thayer v. Middlesex Ins. Co., 10 Pick. 326; Piedmont & Arlington Ins. Co. v. Ewing, 92 U. S. 877; see also *ante*, § 272.

⁵ Williams v. Washington L. Ins. Co., 31 Ia. 541; Ayer v. New England Mut. L. Ins. Co., 109 Mass. 430; Shaw v. Berkshire L. Ins. Co., 103 Mass. 354; Klein v. Ins. Co., 104 U. S. 88; Catoir v. American L. Ins.

policy subject to the condition requiring prompt payment of premium,¹ and no notice of lapse is necessary.² And it does not avail that at the time the policy was taken out it was verbally agreed that the payment of the premium should be extended beyond the time stated.³ If notice of the forfeiture is required by law it must be given before the forfeiture is complete.⁴ After forfeiture the policy can only be revived by a new contract.⁵ A tender after forfeiture will not restore the policy.⁶ Provisions for forfeitures are strictly construed and if the language of the condition is not plain, there will be no forfeiture.⁷ A provision in a policy providing for quarterly premiums, that if death occurs before the full year's premium has been paid, the installments remaining unpaid shall be deducted, is valid.⁸

§ 355. **When Punctual Payment is not Excused.** —An excuse for the payment of premiums, which is in the

etc., Co., 33 N. J. L. 487; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Gateman v. American L. Ins. Co.*, 1 Mo. App. 300; *Security L., etc., Ins. Co. v. Gober*, 50 Ga. 404; *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51; *Kellner v. Mut. Life Ins. Co.*, 43 Fed. R. 623; *Richardson v. Mutual L. Ins. Co. (Ky.)*, 18 S. W. R. 165; *Mutual L. Ins. Co. v. Clancy*, 111 Ga. 865; 36 S. E. R. 944; *Nixon v. Travelers Ins. Co.*, 25 Wash. 254; 65 Pac. R. 195; *Tibbitts v. Mut. Benefit L. Ins. Co.*, 159 Ind. 671; 65 N. E. R. 1033; *U. S. Life Ins. Co. v. Ross*, 159 Ill. 476; 42 N. E. R. 859; *revers.* 57 Ill. App. 98; *Sick v. Covenant M. L. Assn.*, 79 Mo. App. 609.

¹ *Forbes v. Union Cent. L. Ins. Co. (Ind.)*, 41 N. E. R. 84.

² *Manhattan L. Ins. Co. v. Savage*, 23 Ky. L. R. 483; 63 S. W. R. 278.

³ *Coombs v. Charter Oak L. Ins. Co.*, 65 Me. 382.

⁴ *Dial v. Valley Mut. L. Assn.*, 29 S. C. 560; 8 S. E. R. 27. See *post*, § 360.

⁵ *Equitable Life Ass. Soc. v. McElroy*, 28 C. C. A. 365; 83 Fed. R. 631, 49 U. S. App. 548.

⁶ *D'Ortu v. Bankers L. Assn.*, 46 Fed. R. 355 (construction of California statute).

⁷ *Perry v. Bankers L. Ins. Co.*, 47 App. Div. 567; 62 N. Y. Supp. 553.

⁸ *Albert v. Mut. L. Ins. Co.*, 122 N. C. 92; 30 S. E. R. 327; *Equitable L. Ass. Soc. v. Harvey*, 98 Tenn. 636; 40 S. W. R. 1092.

nature of a condition precedent or subsequent as the contract is looked at, only exists when the company has prevented performance of such conditions or payment, or has itself wholly refused to perform or wholly disabled itself from completing a substantial performance. The mere failure of the company to perform some of the obligations of the contract, which go to a part only of the consideration and which breach may be paid for in damages, is not sufficient. Nor is the breach of representations made during the pendency of negotiations for a contract actionable or an excuse for performance by the other party.¹ Nor is it an excuse that the company has violated its charter, and in consequence of such wrongful acts become insolvent, so that it had become unsafe for the insured to pay further premiums, if the company was continuing to do its ordinary business in the ordinary way and was ready to receive premiums.² Nor that the company has in its hands an amount applicable to a dividend soon to be declared, which would when so declared, belong to the insured.³ Nor that the company retains the policy as the bailee of the insured.⁴ Nor the unauthorized surrender by the husband of a policy payable to the wife.⁵ Nor the failure of the company to answer a letter relative to a change.⁶ Nor that the insurance company has failed to place the receipt for the premium in the hands of the local agent.⁷ Nor the death of the local agent where, by the terms of the policy, the

¹ *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328.

² *Taylor v. Charter Oak L. Ins. Co.*, 9 Daly, 489; 59 How. Pr. 468; 8 Abb. N. C. 331. See also *Friedlander v. Mut. Res. L. Assn.*, 34 Misc. R. 285; 69 N. Y. Supp. 618.

³ *Mut. L. Ins. Co. of N. Y. v. Girard, etc., Co.*, 100 Pa. St. 172.

⁴ *Howard v. Mut. Ben. L. Ins. Co.*, 6 Mo. App. 577.

⁵ *Weatherly v. New York Life Ins. Co.*, 178 Mass. 575; 60 N. E. R. 381. But see *post*, § 359a.

⁶ *Mut. L. Ins. Co. of Ky. v. Clancy*, 111 Ga. 865; 36 S. E. R. 944.

⁷ *Morey v. New York L. Ins. Co.*, 2 Woods, 664.

premiums are payable at the home office of the company, "unless otherwise expressly agreed in writing, or to agents when they produce receipts signed by the president or secretary."¹ It is no excuse for non-payment of premium that at the time the payment was to be made the assured was sick and delirious. In holding that this is not a case where performance is prevented by act of God, the Supreme Court of Iowa says:² "There was no such impossibility of performing the contract in this case. It is true, it was impossible for the assured at the time required therein to perform it; but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the policy before her husband's death does not change the case. Prudence and care on the part of the assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time therein prescribed."³ For the same reasons insanity is also no excuse for non-payment of premiums on the day agreed.⁴

§ 356. **Effect of War on the Contract.** — The Supreme Court of the United States has held,⁵ that a life insurance

¹ *Bulgar v. Washington L. Ins. Co.*, 63 Ga. 328.

² *Carpenter v. Centennial Mutual Life Assn.*, 68 Ia. 453; 27 N. W. Rep. 456.

³ *Smith v. Penn. Mut. L. Ins. Co.*, 11 W. N. C. 295; *Scully v. Kirkpatrick*, 79 Pa. St. (29 P. F. Smith) 324; *Klein v. Ins. Co.*, 104 U. S. 88; *Yoe v. B. C. Howard Masonic M. Ben. Assn.*, 63 Md. 86; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276.

⁴ *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543; 16 Hun, 317; *Hawkshaw v. Knights of Honor*, 29 Fed. Rep. 770; *Thompson v. Ins. Co.*, 104 U. S. 252.

⁵ *New York L. Ins. Co. v. Statham*, 93 U. S. 24; *New York L. Ins. Co. v. Davis*, 95 U. S. 425.

policy, which stipulates for the payment of an annual premium, and that it shall be void for non-payment, makes the premium an annuity, the whole of which is the consideration for the contract; and the condition is a condition subsequent, the non-performance of which renders the policy void. If a failure to pay was caused by war, a forfeiture follows, nevertheless, if the insurer insists on the condition; but the insured is entitled to the equitable value of the policy arising from the payments actually made. Upon this question, however, there is a decided difference of opinion, but the rule laid down above seems to be supported by the weight of reasoning as well as of authority.¹ There is an excellent authority, however, opposed to the above rule and which holds that war does not dissolve the contract, but merely suspends it.² And it has been held,³ that equity will, where the payment of premiums was interrupted by war, reinstate the contract on payment of all premiums unpaid with interest thereon. Still the rule as first stated must now be deemed settled.

¹ *Abell v. Penn. Mut. L. Ins. Co.*, 18 W. Va. 400; *Talt v. New York L. Ins. Co.*, 1 Flip. 288; *Bird v. Penn. Mut. L. Ins. Co.*, 11 Phila. 485; 2 W. N. C. 410; *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; *Hancock v. N. Y. Life Ins. Co.*, 13 Am. L. Reg. (N. S.) 103.

² *Mut. Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Hillyard v. Mut. Ben. L. Ins. Co.*, 35 N. J. L. 415; *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610; *Martine v. International L. Ass. Soc.*, 53 N. Y. 339; 62 Barb. 181; 5 Lans. 535; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626; 59 Barb. 556; *Robinson v. International L. Ass. Soc.*, 42 N. Y. 54; 52 Barb. 450; *New York L. Ins. Co. v. Clopton*, 7 Bush, 179; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. 614; *Mut. Ben. L. Ins. Co. v. Atwood*, 24 Gratt. 497; *N. Y. L. Ins. Co. v. Hendren*, *Id.* 536; *Conn. Mut. L. Ins. Co. v. Duereson*, 28 Gratt. 630; *Clemmitt v. New York L. Ins. Co.*, 76 Va. 355; *Statham v. N. Y. L. Ins. Co.*, 45 Miss. 581, where a tender was held to have preserved the rights of the insured.

³ *Bird v. Penn. Mut. L. Ins. Co.*, 3 Fed. Cas. 430; 33 Leg. Int. 33.

§ 357. No Absolute Liability on the Part of the Assured to Pay the Premium if Payment is only a Condition, and there is no Promise to Pay. — In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums, or assessments, and consequently no personal liability therefor. The payment of the premium, or assessments, is only a condition precedent of the liability of the company: the insured does not promise to pay the premiums and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not as he pleases, he has the perfect right to do either and need give no excuse for his choice. If he does not pay the contract is ended. It follows, therefore, that the premium, or assessment, is only a debt when there is an absolute promise to pay embodied in the contract.¹ Whether or not such absolute promise to pay is embodied in the contract is a question of construction. It has been held that the benefit a member derives from his membership is the consideration for his promise to pay an assessment, which promise is implied in the contract.²

§ 358. Time of Payment of Premium may be Extended. — The company, however, or an authorized agent may extend the time of payment of a premium and such extension will be sustained. It is a question of fact whether an extension has been given.³ But where the policy has been forfeited by a violation of one of its conditions, and

¹ *New York L. Ins. Co. v. Statham*, 93 U. S. 24; *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 492; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; and, indeed, all the authorities cited in this chapter.

² *Ellerbe v. Barney*, 119 Mo. 632; 25 S. W. R. 384. In this case, however, several judges dissented. For further discussion of this point see *post*, §§ 377-378.

³ *Dean v. Ætna L. Ins. Co.*, 62 N. Y. 642; *affg.* 2 Hun, 358; *Palmer v. Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63; *Fitzpatrick v. Mutual, etc., Assn.*, 25 La. Ann. 443; *McGraw v. Old North State, etc., Ins. Co.*, 78 N. C. 149; *Winindger v. Globe Mut. L. Ins. Co.*, 3 Hughes, 257.

not by the non-payment of premiums only, so that the policy is void, a mere promise made thereafter without consideration, to continue the policy in existence upon the payment of an additional premium, which is thereafter tendered, but not accepted by the company, will not be enforced.¹ Where the assured has been in the habit of paying his premiums after they became due in accordance with a promise of accommodation the company cannot end such indulgence and insist upon prompt payment without notice.²

§ 359. **Excuses for non-Payment.** — One holding a policy of life insurance does not forfeit his policy by omitting to pay the annual premiums thereon after the company issuing the policy has ceased to do business, transferred all its assets and become insolvent, or after a receiver has been appointed.³ Nor when the insurer is a foreign company and has ceased to do business in the place where the premium is specified to be payable, and has no known agent there.⁴ A company has no right to turn its policy holders over to another company without their consent, and if it does so the policy-holders are not bound to continue to pay their premiums.⁵ Pending negotiations for a change in the policy payment is excused.⁶ And an unau-

¹ *Evans v. United States L. Ins. Co.*, 3 Hun, 587.

² *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567.

³ *Attorney-General v. Guardian Mut. L. Ins. Co.*, 82 N. Y. 336; *Attorney-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Jones v. Life Assn. of America*, 83 Ky. 75; 7 Ky. L. Rep. 1; 2 S. W. R. p. 447; *Bourden v. Mins. Safety Fund Assn.*, 147 Mass. 360; 17 N. E. R. 874.

⁴ *Dorion v. Positive Government, etc., Co.*, 23 Low. Can. Jur. 261. But see *Quinn v. Manhattan L. Ins. Co.*, 28 La. Ann. 135.

⁵ *People v. Empire Mut. Ins. Co.*, 92 N. Y. 105; *People v. Security L., etc., Co.*, 78 N. Y. 114; 34 Am. Rep. 522; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286. But see *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636; 40 S. W. R. 1092.

⁶ *Ætna L. Ins. Co. v. Curley*, 20 Ky. L. R. 723; 47 S. W. R. 585.

thorized demand for an increased premium will excuse.¹ But where a party failed to pay the premium upon his policy which had become due six months prior to the failure of the company and the appointment of a receiver, it was held that the policy was forfeited.² Non-payment of premiums is not excused by the fact that the insured surrendered the policy, which was payable to his wife, to the company on a forged release and accepted a paid-up policy, which latter was not operative because of the forgery;³ but it would be excused if the company had accepted an unauthorized surrender,⁴ or if the company by false representations induced the surrender of the policy.⁵ Nor is the assured bound to continue to offer to pay after a number of premiums have been tendered and refused.⁶

§ 359a. **The Same Subject: Misrepresentation by Company to Obtain Surrender of Policy.**—Where the company by false representations induced the insured to allow his policy to lapse it was held⁷ that the insured, if living, might compel a reinstatement, or if he was dead, his beneficiary might recover upon payment of all premiums due. In this case⁸ the court said: “The substance of de-

¹ *Covenant M. L. Assn. v. Kentner*, 188 Ills. 431; 58 N. E. R. 966; *aff.*, 89 Ill. App. 495; *Mut. Reserve F. L. Assn. v. Taylor*, 99 Va. 208; 37 S. E. R. 854.

² *Attorney-General v. Continental Life Ins. Co.*, 64 How. Pr. 519.

³ *Miles v. Conn. Mut. L. Ins. Co.*, 147 U. S. 177.

⁴ *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; 5 N. E. R. 417; *Garner v. Ins. Co.*, 110 N. Y. 266; 18 N. E. R. 130; *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250; 25 L. R. A. 627; 59 N. W. R. 615.

⁵ *Colby v. Life Indemnity Co.*, 57 Minn. 510; 59 N. W. R. 539; *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250; 59 N. W. R. 615.

⁶ *Griesemer v. Mutual L. Ins. Co.*, 10 Wash. 202; 38 Pac. R. 1031. See also *Real Estate, etc., Co. v. Aetna L. Ins. Co.*, 181 Pa. St. 61; 37 Atl. R. 639.

⁷ *Colby v. Life Indemnity & Ins. Co.*, 57 Minn. 510; 59 N. W. R. 539.

⁸ *Colby v. Life Indemnity & Ins. Co.*, *supra*.

pendant's contention is that the misrepresentation, if any, of the company, was not made with any fraudulent intention; also that it was at most a mere representation as to the law of the contract, which could not be a ground for relief; and also that the fact that the assessment was unauthorized furnished no excuse for the non-payment of the premium. It is not necessary that the misrepresentation should have been made with a fraudulent intent to deceive. It is enough, if it was reasonably calculated to mislead, and did mislead, Colby to his prejudice. It may be here added that, under the circumstances, a representation by the company that it had a right to make the assessment included, by necessary implication, a representation that it had a right to make future ones, and that, if these assessments were not paid, the policy would lapse, notwithstanding the payment of the premiums. We recognize that the general rule is that, as between parties bearing no fiduciary relation to each other, a mere misrepresentation of law by one party, or a mere mistake of law by the other party, is no ground for relief. But it seems to us that, in view of all the facts, the acts of the company amounted to more than a mere misrepresentation of law. It originally organized its business on a plan financially vicious and unsound, and in its subsequent efforts to change its base, its conduct was characterized throughout by a course of backing, and filling and hedging that was well calculated to deceive and mislead men of ordinary intelligence, but not experts in the insurance business. Indeed, the company itself did not seem to know where it stood. The disparity of the parties must also be borne in mind. Ordinary men are not usually acquainted with all the intricacies of insurance contracts, while the insurer is presumed to be an expert on the subject; and it is a matter of common knowledge that the insured are accustomed to rely largely on the insurer for information as to their rights and liabilities.

The somewhat complicated history of the transaction did not present a simple legal proposition, familiar to the ordinary mind, but a complex question, involving an element of fact as well as of law, and about which mistake or misunderstanding might well be supposed to exist. The company had for years been representing to Colby, by both words and acts, that he was no longer liable on the special two-fifths assessment clause in his original certificate and it was a fair inference that he had paid his premiums on the faith of this representation. The act of the company in making an assessment against him in August, 1891, amounted to a representation that he still remained liable under the clause referred to. The reason for this change of front was not stated. Colby might have supposed that it was for some cause not appearing on the face of the policy; as, for example, the inability of the company to induce some of the old certificate holders to come into the new arrangement. But, even if the misrepresentation deemed to have been merely as to the law of the contract, still it seems to us that the relation of the parties was such as to render the misrepresentation a ground for relief to the extent of preventing a forfeiture. While the company (a mutual one), as a corporate entity, and its members, were in one aspect of the case, opposite contracting parties, yet in another aspect, they occupied a sort of fiduciary relation to each other, somewhat analogous to that of principal and agent, or *cestui que trust*; and it is a familiar principle that, when the contracting parties bear a fiduciary relation to each other, a misrepresentation as to the law of the contract may be a ground for relief. If Colby knew that the assessment was illegal, the act of the company in making it would not be sufficient excuse for his not paying or tendering his premium; but if, by the misrepresentation of the company, he was led to honestly and reasonably believe that the assessment was

valid, and that he would have to pay it as well as his premiums, to keep his policy from lapsing, and he was thereby caused to refrain from paying the premium, which he otherwise would have paid, as the jury might have found, this would constitute a valid excuse. Our view is that, if the facts were as we have indicated, Colby, if living, would have been entitled to a reinstatement of his policy on payment of all premiums due; and, if this is so, it would seem to follow that plaintiff, as the beneficiary of the policy, would be entitled to recover the amount of it, less these premiums." And in such an action the non-payment of a subsequent premium is no defense.¹ But if the company, without misleading the assured, purchases a policy, the sale will be upheld, the same rules applying as in the case of the sale of any chose in action and the doctrine of *uberrima fides* does not apply.²

§ 360. **Where the Company must Give Notice of Maturity of Premium: The New York Statute.** — Unless so stipulated in the policy the insurer is not generally bound to give notice of the maturity of a premium where the amount of such premium is fixed by the contract. The fact that before the policy was issued a promise of notice was made is immaterial, such promise not being embodied in the policy,³ nor will it excuse that the company had a usage of giving notice.⁴ Where the statute requires notice to be given that if the premium be not paid within a certain time "the policy and all premiums paid thereon will become forfeited and void," such notice must be given and

¹ *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250; 59 N. W. R. 615.

² *Potts v. Temperance, etc., Co.*, 23 Ont. R. 73. As to rescission see *ante*, § 277a.

³ *Insurance Co. v. Mowry*, 96 U. S. 544.

⁴ *Mandego v. Centennial Mut. Assn.*, 64 Ia. 134; *Thompson v. Ins. Co.*, 104 U. S. 252; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177.

it is not sufficient if the notice only says that members who do not pay "are carrying their own risk,"¹ it is enough if the notice substantially conform to the words of the statute.² The requirements of the statute must be however observed.³ The provisions of this statute cannot be waived.⁴ Many questions have arisen concerning the construction to be placed on the New York statute requiring notice of a premium to be given before the policy can be forfeited for the non-payment of such premium. The statute has been changed several times, and the earlier decisions are not always applicable. It has been held that the required notice must be given to the assignee of the policy,⁵ and that there was no implied authority in the husband to receive notice of a premium due under a policy payable to the wife.⁶ Under the subsequent change in law, notice is to be given to the insured. To what extent the New York statute is applicable has been discussed by the Supreme Court of the United States⁷ as follows: "The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circum-

¹ *Phelan v. N. W. M. L. Ins. Co.*, 113 N. Y. 147; 20 N. E. R. 827; reversing 42 Hun, 419. Other cases where the notice was held defective are: *Security Trust Co. v. Hallum* (Tex. Civ. A.), 73 S. W. R. 554; *Nederland L. Ins. Co. v. Meinert* (C. C. A.), 127 R. 657.

² *McDougal v. Provident Savings, etc., Soc.*, 135 N. Y. 551; 32 N. E. R. 251; reversing 19 N. Y. Supp. 481.

³ *Equitable L. Ass. Soc. v. Nixon*, 26 C. C. A. 620; 81 Fed. R. 796; 48 U. S. App. 482.

⁴ *Osborne v. Home L. Ins. Co.*, 123 Cal. 610; 56 Pac. R. 616; *Harrington v. Home L. Ins. Co.* (Cal.), 58 Pac. R. 180.

⁵ *Strauss v. Union Central L. Ins. Co.*, 170 N. Y. 349; 63 N. E. R. 347; affirming 70 N. Y. Supp. 1149; *Osborne v. Home L. Ins. Co.*, 123 Cal. 610; 56 Pac. Rep. 616.

⁶ *Rowe v. Brooklyn L. Ins. Co.*, 11 App. Div. 532; 42 N. Y. Supp. 646; affirming 162 N. Y. 604; 57 N. E. R. 1123.

⁷ *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262.

stances, under the general rule, the contract was a Montana contract, and governed by the laws of that State.¹ In that State, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company. New York, on the other hand, the State by which the insurance company was chartered and in which it had its principal office, by sec. 1 of chapter 321 of 1877 had enacted — ‘Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided.’ The provision referred to, and which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way.² This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover. The question therefore is whether the law of New York controls. The presumption is in favor of the laws of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the State. Undoubtedly a foreign

¹ *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, *sub nom.*; *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 500; 11 Sup. Ct. Rep. 822.

² The section is quoted in full in 178 U. S. 330; 44 L. Ed. 1089; 20 Sup. Ct. Rep. 906.

insurance company making a contract within the State of New York would find the contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other States to control insurance contracts made within their limits. Can it be that the State of New York, aware of the fact that other States and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those States and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home? Again, it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of

notice.¹ The varying provisions of these statutes, directed in terms, not to local companies, but to companies doing business in the State of New York, strengthen the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State. Again, the terms of the act itself tend in the same direction. It provides for a thirty-day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a thirty-day notice in many cases would be of little value. Further, by sec. 2 the statute provides that an affidavit by one authorized to mail the notice shall be 'presumptive evidence' of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every State and nation of the world? These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be, and is, in fact, applicable only to business transacted within that State. It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is 'subject to the charter of such company and the laws of said State;' and the contract refers to the application, and declares that it is issued 'in consideration of the appli-

¹ See Laws 1876, chap. 341, sec. 1; the statute now under consideration, Laws 1877; Laws 1892, chap. 690, sec. 92; Laws 1897, chap. 218, sec. 92.

cation for this policy and of the truth of the several statements made therein.' While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all respects controlled by the laws of New York. Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the State of New York as are intended to and do change the charters of the companies, or are intended to have extra territorial application, should be considered a part of the policy. The stipulation in this policy is different from that presented to the Court of Appeals of New York in *Baxter v. Brooklyn L. Ins. Co.*,¹ which was that it was "a contract made and to be executed in the State of New York, and construed only according to the laws of that State.' There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms. While authorities on this particular question are

¹ 119 N. Y. 450; 7 L. R. A. 293; 23 N. E. 1048.

not numerous, we may properly refer to an opinion of the Supreme Court of Washington, the State in which this action was brought¹ in which, referring to this special question, and the contention that this very statute of the State of New York became a part of the contract of the company in the State of Washington, the court said, on pages 206, 207: "It is claimed on the part of the plaintiff that upon its enactment it became attached to the defendant, it being a corporation organized under the laws of New York, and effected a change in its charter, so that every policy thereafter issued by it, whether in the State of New York or elsewhere, became subject to its provisions. On the other hand, it is claimed by the defendant that it only affected policies issued to, or held by, residents of the State of New York; that the evident object of its enactment was to protect such residents; that to give it a broader effect would be to convict the legislature of having discriminated against life insurance companies organized under the laws of the State. We are unable to construe the law in accordance with the contention of either party. The construction contended for by the defendant is too narrow. The language used is, that 'no life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy * * *.' This language, construed in its ordinary sense, seems to preclude such a narrow construction. Besides, if it were warranted by the language, it would not be reasonable to suppose that the legislature intended to so limit the effect of the statute. If it had so intended, it would have made use of language which in some manner confined the rights to be affected by the statute to residents of the State, instead of to companies doing business therein. While the construction contended for by the plaintiff seems to be

¹ *Griesemer v. Mutual L. Ins. Co.*, 10 Wash. 202; 38 Pac. 1031.

equally untenable, for the reason that it would convict the legislature of having sought to accomplish something not in its power. So construed the act would apply to all policies of any company which should do business in the State of New York, wherever issued, regardless of the question as to whether or not it was organized under its laws. That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument. Hence the construction contended for by respondent would convict the legislature of having attempted that which it could not do, or of having deliberately discriminated against its own companies. In our opinion the reasonable and ordinary construction of the language used in the statute is such as to make it applicable to business done in the State of New York; and that the question as to whether or not the companies doing such business were organized under its laws, or those of some other State, has no influence upon the question as to whether or not the statute is applicable. This construction is justified by the language used, and will give force to every word, while the other will not do so. And since the well-settled rule as to construction of statutes requires every word to be given force if possible, it follows that the limitations of the act are impressed upon all policies issued in the State of New York by either domestic or foreign companies, and that it has no application to policies not insured therein, even although the companies issuing them were organized under its laws.' ”¹ So where a life policy issued by a New York company to a resident in Texas provided that it should be governed by the laws of the State of New York, it was held that notice must be mailed to the insured in Texas.²

¹ To the same effect is *Grevening v. Washington L. Ins. Co.*, 112 La. Ann. ; 36 Sou. Rep. 790.

² *Washington Life Ins. Co. v. Berwald* (Tex. Civ. App.), 72 S. W. R.

An assessment contract is not within the law;¹ nor a benefit society.² A company is not bound to give notice after a lapse.³ The affidavit of service of notice is only presumptive evidence.⁴ But if the notice was in fact mailed, it is immaterial that it was not received.⁵ The statute does not apply to mortality assessments,⁶ and a stipulation in the contract that if no notice of assessment is received the assured shall forward an amount equal to the last assessment is inoperative and no forfeiture can be declared where the notice was not given in conformity to the statute.⁷ So where the company promised to give notice in order to induce the assured to enter into the con-

436. See also *New York L. Ins. Co. v. English*, 95 Tex. 391; 67 S. W. R. 884; *Equitable L. Assur. Co. v. Nixon*, 26 C. C. A. 620; 48 U. S. App. 482; 81 Fed. Rep. 796.

¹ *Baldwin v. Provident Savings L. Assur. Soc.*, 162 N. Y. 636; 57 N. E. R. 1103; affirming 23 App. Div. 5; 48 N. Y. Supp. 463; *Rosenplaster v. Provident Savings L. Assur. Soc.*, 37 C. C. A. 566; 96 Fed. Rep. 721; 46 L. R. A. 473.

² *People v. Supreme Tent*, 45 N. Y. Supp. 1096; 18 App. Div. 488.

³ *Leonhardt v. Provident Savings L. A. Co.*, 130 Fed. Rep. 287.

⁴ *Equitable L. Assur. Soc. v. Nixon*, *supra*.

⁵ *McConnell v. Provident Savings L. A. Soc.*, 34 C. C. A. 663; 92 Fed. Rep. 767. Other cases where the New York statute has been construed, not cited in other places are as follows: *N. Y. L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284; 61 S. W. R. 336; *Mullen v. Mutual L. Ins. Co.* (Tex. Civ. App.), 32 S. W. R. 94; *New York L. Ins. Co. v. Smith* (Tex.), 41 S. W. R. 680; *Summit v. U. S. L. Ins. Co. (Ia.)*, 99 N. W. R. 563. The statute does not apply to notes given for premiums. *Banholtzer v. N. Y. L. Ins. Co.*, 74 Minn. 387; 77 N. W. R. 295. As to time and sufficiency of notice, see *Trimble v. N. Y. L. Ins. Co.*, 20 Washington, 386; 55 Pac. Rep. 429; *New York L. Ins. Co. v. Scott*, 23 Tex. Civ. App. 541; 57 S. W. R. 677. As to computation of time, *Mutual L. Ins. Co. v. Dingley*, 40 C. C. A. 459; 100 Fed. Rep. 408; 49 L. R. A. 132; *Kentucky L. & A. Co. v. Kaufman*, 102 Ky. 6; 42 S. W. R. 1104; *Hicks v. National L. Ins. Co.*, 9 C. C. A. 215; 60 Fed. Rep. 690.

⁶ *Merriam v. Keystone, etc., Assn.*, 138 N. Y. 116; 33 N. E. R. 738. But see *Jacklin v. National L. Assn.*, 24 N. Y. Supp. 746.

⁷ *Warner v. National L. Assn.*, 100 Mich. 157; 58 N. W. R. 667. See also *Linn v. N. Y. Life Ins. Co.*, 78 Mo. App. 192.

tract, such promise must be complied with.¹ In computing time the day of mailing the notice is excluded.² The burden is on the company to show such notice.³ But if it was the general practice of the company to notify the assured of the amount of the premium and the share of profits to which he, as a member of a mutual company, was entitled to receive under the terms of the contract, and the company had knowledge of the residence of the assured and failed to notify the assured and by reason thereof a premium is not paid when due, the company cannot set up such failure to pay as a defense to the policy.⁴ And where the company under such circumstances repudiates the contract and clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender is excused.⁵ It is competent for the parties to modify the contract in regard to the payment of premiums or notice and the terms of such modification must be complied with by the insurer.⁶ Where the husband procures a policy of insurance on his life payable to his wife or children he will be taken to be their agent for the purpose of receiving notice of the premiums.⁷ If

¹ *True v. Bankers, etc., Assn.*, 78 Wis. 287; 47 N. W. R. 520; *Keeler v. N. Y. State, etc., Assn.*, 20 N. Y. Supp. 935.

² *Hicks v. National L. Assn.*, 9 C. C. A. 215; 60 Fed. R. 690.

³ *Baxter v. Brooklyn L. Ins. Co.*, 44 Hun, 184; affirmed 119 N. Y. 450; 23 N. E. R. 1048.

⁴ *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Insurance Co. v. Eggleston*, 96 U. S. 572; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304. See also *Keeler v. New York State Ben. Assn.*, 20 N. Y. Supp. 935; *Manhattan L. Ins. Co. v. Fields*, (Tex. Civ. A.), 26 S. W. R. 280.

⁵ *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Attorney-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30.

⁶ *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1; *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 576. But see *Warner v. National L. Assn.*, *supra*.

⁷ *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; reversing 33 Hun, 425; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156.

the company has a custom of giving notice of premiums it cannot discontinue it without so advising the assured.¹

§ 361. **Receipt of Premiums after They are Due: Usage.** — Where the insurer has, by a course of dealing, established a habit of receiving premiums after they are due, it may be held to have waived the provision that time shall be of the essence of the contract and it cannot change this course of dealing without notice to the assured.² If the habit has been to receive the overdue premiums conditionally, as upon the insured being in good health, the company will not be bound by a tender, after the premium is due, unless the insured is in health;³ but being in good health only means the general understanding of the parties as to the usual health of the assured.⁴ An unauthorized agent cannot add new conditions to those customary to be imposed by the company upon receiving overdue premiums.⁵ The premium, however, must be paid within a reasonable time after it is due, even though prompt payment is waived.⁶

¹ *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 396; 48 S. W. R. 968; *James v. Mut. R. F. L. Assn.*, 148 Mo. 1; 49 S. W. R. 978; *Suess v. Imperial L. Ins. Co.*, 86 Mo. App. 10; *Denver Life Ins. Co. v. Crane* (Colo. App.), 73 Pac. R. 875.

² *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51; *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; *Thompson v. St. Louis Mut. L. Ins. Co.*, 52 Mo. 469; *Home Protection, etc., Soc. v. Avery*, 85 Ala. 348; 5 South. R. 143; *Spoeri v. Mass. M. L. Ins. Co.*, 39 Fed. R. 752; *Goodwin v. Provident Sav. L. A. Soc.*, 97 Ia. 226; 66 N. W. R. 157; 32 L. R. A. 473; *Hines v. Mut. L. Ins. Co. (Ky.)*, 33 S. W. R. 202; *Clark v. Metropolitan L. Ins. Co.*, 107 Mich. 160; 65 N. W. R. 1; *Jackson v. Royal Ben. Soc.*, 15 Misc. 481; 37 N. Y. Supp. 28; *James v. Mut. R. F. L. Assn.*, 148 Mo. 1; 49 S. W. R. 978; *post*, § 362.

³ *Mut. L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172; *Hartford L. & A. Ins. Co. v. Unsell*, 144 U. S. 439; *affg.* 32 Fed. R. 443.

⁴ *Campbell v. National Ins. Co.*, 24 Up. Can. C. P. 133.

⁵ *Cotton States L. Ins. Co. v. Lester*, *supra*.

⁶ *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 86 Pa. St. 236; 97 Pa. St. 15;

§ 362. **Company Must not Mislead Assured.** — Forfeitures are odious and will only be enforced where there is the clearest evidence that that was the intention of the parties. If, therefore, the company so deals with the assured as to induce a belief that the forfeiture will not be exacted in case of a dereliction of payment at the day and so puts him off his guard, it will not be permitted to take advantage of a default which it has itself encouraged. “In transactions of this nature,” says the Supreme Court of Pennsylvania,¹ “it is easy to mislead by a pretense of liberality, if followed by entire strictness in practice, and the only cure for this is the inquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon the party’s rights, which ought to be condemned and redressed.”² Thus, where the company was in the habit of receiving overdue premiums and sent out letters with the words, “Every policy is non-forfeiting,” printed prominently thereon, it was held that these facts were sufficient to

Bergmann v. St. Louis Mut. L. Ins. Co., 2 Mo. App. 262; *Leslie v. Knickerbocker L. Ins. Co.*, 63 N. Y. 27.

¹ *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107. For discussion of law of waiver of payment at agreed time see *post*, § 431, *et seq.*

² *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Ruse v. Ins. Co.*, 26 Barb. 556; *Union Central L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276; *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; *Bergmann v. St. Louis L. Ins. Co.*, 2 Mo. App. 262; *O'Reilly v. Guardian Mut. L. Ins. Co.*, 1 Hun, 460; *Brooklyn L. Ins. Co. v. Bledstone*, 25 Ala. 538; *McCorkle v. Texas Ben. Assn.*, 71 Tex. 149; 8 S. W. Rep. 516; *Home Protection, etc., Soc. v. Avery*, 85 Ala. 348; 5 South. R. 143; *Odd-fellows, etc., Assn. v. Swetzer*, 117 Ind. 97; 19 N. E. R. 722; *Eglutter v. Mut. R. F. L. Assn.*, 52 La. Ann. 1733; 28 Sou. R. 289; *Schwartz v. U. S. L. Ins. Co.*, 55 C. C. A. 104; 118 Fed. 250; *Ætna L. Ins. Co. v. Hartley*, 24 Ky. L. R. 57; 67 S. W. R. 19; 68 S. W. R. 1081; *De Frece v. National L. Ins. Co.*, 136 N. Y. 144; 32 N. E. R. 556. So a conditional receipt has been held a snare. *Andrus v. Fidelity M. L. Assn.*, 168 Mo. 151; 67 S. W. R. 582. See also *James v. Mut. R. F. L. Assn.*, 148 Mo. 1; 49 S. W. R. 978; *Kendrick v. Mut. Ben. L. Ins. Co.*, 124 N. C. 315; 32 S. E. R. 728.

prevent the company from insisting upon forfeiture for non-payment of premium.¹ And so where the insured was misled by a duly authorized agent of the company as to the day of payment, the non-payment of the premium in consequence of such information cannot be set up to avoid the policy.² A clerk, employed in the office of the general agent of the company, who collected premiums and took risks, and had given the insured receipts for the payment of former premiums, countersigned by the general agent, is, it has been held, clothed with the insignia of agency and the insured may rely upon his agreement that personal demand should be made for future payments.³ And so of a person at the cashier's desk in the office of the company who promised that notice should be given.⁴ And where the secretary of a mutual company retained the money sent in payment of overdue assessments and dues, without notifying the insured whether the amount of the remittance was satisfactory or not; such action is a waiver of the default.⁵ And the same is true where the company promised that an agent should call for the premium.⁶ Or if payment was extended.⁷ And the company cannot set up a default as a forfeiture if it was caused by the fraud of its agent intrusted with general authority to collect.⁸ In such cases, where the conduct of the company has been

¹ *Home L. Ins. Co. v. Pierce*, 75 Ill. 426.

² *Selvage v. Hancock, etc., Ins. Co.*, 12 Fed. Rep. 603.

³ *Maver v. Mut. L. Ins. Co.*, 38 Ia. 304.

⁴ *Leslie v. Knickerbocker L. Ins. Co.*, 63 N. Y. 27.

⁵ *Georgia Masonic, etc., Co. v. Gibson*, 52 Ga. 640.

⁶ *Goedecke v. Metropolitan L. Ins. Co.*, 30 M. A. 601; *Baker v. Michigan Mut. Prot. Assn.*, 118 Mich. 431; 76 N. W. R. 970.

⁷ *Ætna L. Ins. Co. v. Sanford*, 200 Ill. 126; 65 N. E. R. 661. As to what constitutes an agreement for extension: *Ætna L. Ins. Co. v. Ragsdale*, 95 Va. 579; 29 S. E. R. 328.

⁸ *McLean v. Piedmont & Arlington L. Ins. Co.*, 29 Gratt. 361; *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203.

misleading, the ordinary principles of estoppel apply and preclude the company from setting up the forfeiture.¹

§ 363. **Effect of Prospectus.** — It has been held in England that a prospectus, issued by the company at the time of making the policy, setting forth that policies will be indisputable except for fraud, becomes a part of the contract, as a representation, that the assured can avail himself of in equity.² But in this country the doctrine is doubted. In *Ruse v. Mut. L. Ins. Co.*,³ the New York Court of Appeals held that a prospectus, issued by a life insurance company, stating that a party neglecting to settle his annual premiums within thirty days after it is due forfeits his interest in his policy, was inadmissible to vary an express provision in the policy, that a failure to pay the premiums promptly would vitiate it. But on a motion for a rehearing the court intimated that it might reconsider the question if necessary, but deemed it unnecessary in that particular case.⁴ In Georgia, in a case involving the same question, the Supreme Court held⁵ the same as the New York Court of Appeals.⁶ A circular, calling attention to the liberality of the company in extending the time for payment of premiums, has been held admissible to show waiver.⁷

¹ *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220; *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Horn v. Cole*, 51 N. H. 287; *Insurance Co. v. Wolff*, 95 U. S. 326. See *post*, § 431, *et seq.*

² *Collett v. Morrison*, 9 Hare, 162; *Wood v. Dwarrris*, 11 Exch. 493; *Wheelton v. Hardisty*, 92 E. C. L. 231; 8 El. & Bl. 232; *Central Ry. Co. v. Kisch*, 2 H. L. Cas. 99; *Savin v. James*, 6 East, 571.

³ 23 N. Y. 516.

⁴ *Ruse v. Mut. L. Ins. Co.*, 24 N. Y. 653.

⁵ *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534.

⁶ 23 N. Y. 516, *supra*. And see also, where the same point was considered, *Fowler v. Metropolitan L. Ins. Co.*, 116 N. Y. 389; 22 S. E. R. 576.

⁷ *United States L. Ins. Co. v. Ross*, 159 Ill. 476; 42 N. E. R. 859; *reversg.* 57 Ill. App. 98.

§ 364. **Refusal to Receive Premiums.** — Where the insurer refuses to receive the premium when tendered, basing the refusal on the unfounded claim that the policy has been forfeited, a suit in equity is maintainable to have the policy declared existing and in force. As where plaintiff had a policy which by its terms was forfeited by a failure to pay a premium when due: plaintiff was entitled to a dividend to be applied to the premium and, in consequence of the course of dealing, had no knowledge of the exact amount to be paid until advised by the company, which was accustomed to send, in advance of the time of payment, a statement of the amount due. Plaintiff not having received the statement, wrote for it and sent the amount he supposed would be required. The letter was received by the company in sufficient time to have notified plaintiff so that he could have paid on the day; three months afterwards the company answered that the policy was canceled and returned the money; afterwards plaintiff tendered the premium, which was refused. On these facts it was held that the company could not claim the forfeiture.¹ There is no forfeiture where the insured offers, at the date of the maturity of the premium, to pay it to the insurer's agent, who refuses to receive it on the ground that he has not received the receipts for the same from the home office.² Where, however, the company refused to receive the premium unless an increased amount was paid, because the insured was residing south and the agent of the insured said that he would decide next day, at which time he tendered the premium and the additional amount, which were refused, it was held that, as there was no agreement to pay the increased amount on the part of the insured the promise of

¹ *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; affirming 51 How. Pr. 263; *Hayner v. American Popular L. Ins. Co.*, 69 N. Y. 435.

² *Kantrener v. Penn. Mut. L. Ins. Co.*, 5 Mo. App. 581; *Shear v. Mut. L. Ins. Co.*, 4 Hun, 800.

the company to receive it was without consideration and not binding.¹ After one refusal to accept the premium the insured is not bound to make formal tenders of subsequent premiums on each pay-day.²

§ 365. **Dividends: Mutual Accounts.** — Where the premium is to be reduced by application of a dividend there will be no forfeiture until a statement is given by the company so that the insured may know how much to pay.³ Where a mutual insurance company has in its hands dividends belonging to a policy-holder more than sufficient to pay an accruing premium when it falls due, the company is bound, if the premium is not paid, to make such an appropriation and cannot declare the policy forfeited for failure to pay the premium in question. Especially is this so where the insured had been in the habit of applying his dividends to the payment of premiums.⁴ But the dividends must be sufficient to pay the premium.⁵ If there are mutual accounts between the insurer and insured, charging the premium to the latter is payment.⁶ But a mere indebtedness of a small amount by the company to the insured for services will not excuse the non-payment of premium, no usage to the contrary being shown.⁷ And if the policy

¹ *Evans v. United States L. Ins. Co.*, 64 N. Y. 304.

² *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Shaw v. Republic Ins. Co.*, 69 N. Y. 286; *Hayner v. Popular Ins. Co.*, *Id.* 435; *Griesemer v. Mut. L. Ins. Co.*, 10 Wash. 202; 38 Pac. R. 1031; *Real Estate Co. v. Aetna Life Ins. Co.*, 181 Pa. St. 61; 37 Atl. R. 639.

³ *Nall v. Provident Savings L. A. Soc. (Tenn. Ch.)*, 54 S. W. R. 109. See also *Aetna L. Ins. Co. v. Hartley*, 24 Ky. L. R. 57; 67 S. W. R. 19; 68 S. W. R. 1081.

⁴ *Girard, etc., Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Brooks v. Phoenix Mut. L. Ins. Co.*, 16 Blatchf. 182; *Chicago L. Ins. Co. v. Warner*, 80 Ill. 410. See as to rights of policy holders to dividends, *ante*, § 167*b*. As to rescission, *ante*, § 277*a*.

⁵ *Bulger v. Washington L. Ins. Co.*, 63 Ga. 328.

Butler v. Am. Popular L. Ins. Co., 10 Jones & Sp. 342.

Willcuts v. Northwestern Mut. Ind. Co., 81 Ind. 300.

provides how dividends shall be appropriated that will govern.¹ An agreement by the agent that the premium is to be paid by commissions may be binding on the company.²

§ 366. **Credit for Premiums.** — Credit for a premium may be given by a duly authorized agent, either with or without delivery of the receipt therefor, and in such case the rights of the insured will not be affected by the non-payment.³ This is especially the case if credit is given by an agent with the knowledge of the company,⁴ and the charging up the premium to the account of the insured by the general agent will be deemed a credit.⁵ But when the insured is permitted to make the payment of the premium in thrice yearly installments, the payment of the first will not be taken to give him credit for the second and third payments to the end of the year.⁶ The fact that the company once allowed credit does not warrant the inference of a custom to that effect.⁷ The indorsement of an extension on the premium notice has no implied condition that the insured shall be living at the time the credit matures.⁸

¹ *Hull v. Northwestern Ins. Co.*, 39 Wis. 397. As to rebates on premiums see *Thompson v. N. Y. L. Ins. Co.*, 21 Oreg. 466; 28 Pac. R. 628.

² *Mich. L. Ins. Co. v. Beavan*, 26 Ill. App. 349.

³ *Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Lebanon Mut. L. Ins. Co. v. Hoover*, 18 W. N. C. 223; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 502; *Church v. Lafayette F. Ins. Co.*, 66 N. Y. 222; *Societe, etc., v. Morris*, 24 La. Ann. 347; *Union L. Ins. Co. v. Haman*, 54 Neb. 599; 74 N. W. R. 1090; *Frazer v. Home L. Ins. Co.*, 71 Vt. 482; 45 Atl. R. 1046; *Aetna L. Ins. Co. v. Sanford*, 98 Ill. App. 376; *affd.* 200 Ill. 126; 65 N. E. R. 661.

⁴ *Insurance Co. v. Colt*, 20 Wall. 560; *Miller v. Life Ins. Co.*, 12 Wall. 185; *Matter of Booth*, 11 Abb. N. C. 145.

⁵ *People v. Globe Mut. L. Ins. Co.*, 65 How. Pr. 239.

⁶ *Howard v. Continental L. Ins. Co.*, 48 Cal. 229.

⁷ *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300.

⁸ *Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478.

§ 367. **Payment to Agent.** — An agent of a life insurance company, intrusted with receipts for premiums may, by a custom of receiving premiums after they are due, as, for example, by giving credit until the first of the next month or by their mere receipt after due, bind his company so that it cannot insist upon a forfeiture for the non-payment.¹ But the agent must be acting for the company: if he makes a personal agreement with the insured to pay the premiums he is the agent of the insured not of the company, and the latter is not bound.² The act of the agent however may be ratified by the company.³ Money advanced by a sub-agent to a general agent may be held to be an advance on account of premiums expected to be collected, including one on the life of the sub-agent for the benefit of his wife.⁴ A mere clerk in the office of the company cannot, by receipt of overdue premiums, bind his company so that the forfeiture will be waived.⁵ Where the assured had been in the habit of paying the annual premium to the local agent of the company, and such payments have been accepted by the latter without objection, although the policy provided for payment at

¹ *Mound City Mut. L. Ins. Co. v. Twining*, 19 Kan. 349; *Ins. Co. v. Norton*, 96 U. S. 234; *Ins. Co. v. Wolff*, 95 U. S. 326; *Unsell v. Hartford L. & A. Ins. Co.*, 32 Fed. Rep. 443; *Piedmont & Arlington L. Ins. Co. v. McLean*, 31 Gratt. 517; *Same v. Lester*, 59 Ga. 812; *American L. Ins. Co. v. Green*, 57 Ga. 469; *Wyman v. Phoenix M. L. Ins. Co.*, 119 N. Y. 274; 23 N. E. R. 907; affg. 6 N. Y. Supp. 289; *Penn. M. L. Ins. Co. v. Keach*, 134 Ill. 583; 26 N. E. R. 106; *Conway v. Phoenix M. L. Ins. Co.*, 140 N. Y. 79; 35 N. E. R. 420. But see *Brown v. Mass. M. L. Ins. Co.*, 59 N. H. 298.

² *Parker v. Knights Templar, etc., Co. (Neb.)*, 97 N. W. R. 281. See also *Cyrenius v. Mut. L. Ins. Co.*, 18 App. Div. 599; 46 N. Y. Supp. 549; *Union Cent. L. Ins. Co. v. Berlin*, 90 Fed. R. 778; 33 C. C. A. 274; *Jones v. N. Y. L. Ins. Co.*, 122 N. C. 578; 29 S. E. R. 846; *Dunn v. National L. Ins. Co.*, 69 N. H. 224; 39 Atl. R. 1075.

³ *Imbrie v. Manhattan L. Ins. Co.*, 178 Pa. St. 6; 35 Atl. R. 556.

⁴ *Thompson v. American Tontine, etc., Ins. Co.*, 46 N. Y. 674.

⁵ *Koelges v. Guardian L. Ins. Co.*, 2 Lans. 480.

the principal office of the company, a tender of the annual premium to such agent is sufficient to prevent forfeiture.¹ But where the policy contained an express provision that any alteration or waiver of its conditions "unless made at the head office, and signed by an officer of said company, shall not be considered as valid," it was held by the Court of Appeals of New York² that, even admitting that a general agent ordinarily might waive forfeitures or conditions, he would have no such power, if his authority was thus curtailed and limited by an express provision in the policy itself, thus brought to the knowledge of the assured.³ But it must be remembered that outside of all questions as to the authority of agents to receive premiums after they are due, so as to waive a forfeiture, there may be the question of custom, and whether the company by its agent so misled the assured as to create an estoppel.⁴ One who has paid his premiums to an agent will be protected, if, without notice that the agent's authority has been revoked, he pays his premium in due time to such agent.⁵ In cases where the agent, formerly intrusted with the collection of premiums, has been changed, the company must notify the policy-holders thereof.⁶ If no notice has been given of a change of agents the insured has a reasonable time to find the new agent.⁷ And where, after diligent inquiry, the

¹ *Morey v. New York L. Ins. Co.*, 2 Woods, 663.

² *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278. But see *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358; 19 Atl. R. 386. The requirements as to payment to an agent do not apply when the money is sent direct to the company. *Bishop v. Covenant M. L. Ins. Co.*, 85 Mo. App. 302.

³ *Insurance Co. v. Wilkenson*, 13 Wall. 222; *Insurance Co. v. Fletcher*, 117 U. S. 519.

⁴ *Post*, §§ 432, 433.

⁵ *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Seamans v. N. W. Mut. L. Ins. Co.*, 1 McC. 508; 3 Fed. Rep. 325.

⁶ *Briggs v. National Ins. Co.*, 11 Fed. Rep. 458.

⁷ *Seamans v. N. W. Mut. L. Ins. Co.*, *supra*.

insured could not find the new agent, and sixty days after the premium was due tendered it to the former agent, it was held that the delay was not unreasonable and that there was no forfeiture.¹ Where the company discontinued its agency at the place of the residence of the assured, and thereafter notified him from time to time where to pay, but the insured did not receive the notice of one premium and did not find out where the receipt was until nearly sixty days later, when he made a tender, which the agent refused to receive unless a certificate of health was furnished, which was not done, and the assured died a few days later, it was held that there was no forfeiture.² In this case, the court says: "The business of life insurance is in the hands of a few large companies, who are generally located in our large commercial cities. Take a company, located, like the plaintiff in error, in New York, for example. It solicits business in every State of the Union, where it is represented by its agents, who issue policies and receive premiums. Could such a company get one risk where it now gets ten, if it was expected or understood that it was not to have local agents accessible to the parties insured, to whom premiums could be paid instead of having to pay them at the home office in New York? The universal practice is otherwise. Local agents are employed. The business could not be conducted on its present basis without them. Now, suppose the local agent is removed, or ceases to act, without the knowledge of the policy-holders, and their premiums become due, and they go to the local office to pay them, and find no agent to receive them; are these policies to be forfeited? Would the plaintiff in error, or any other company in good standing, have the courage to say so? We think not. And why not? Simply because the policy-holders would have the right to rely on the

¹ *Ibid.*

² *Insurance Co. v. Eggleston*, 96 U. S. 572.

general understanding produced by the previous course of business pursued by the company itself, that payment could be made to a local agent, and that the company would have such an agent at hand, or reasonably accessible. We do not say that this course of business would alter the written contract, or would amount to a new contract relieving the parties from their obligation to pay the premium to the company if they can find no agent to pay to. That obligation remains. But we are dealing with the question of forfeiture for not paying at the very day; and, in reference to that question, it is a good argument in the mouths of the insured to say: 'Your course of business led us to believe that we might pay our premiums at home, and estops you from exacting the penalty of forfeiture without giving us reasonable notice to pay elsewhere.' The course of business would not prevent the company, if it saw fit, from discontinuing all its agencies, and requiring the payment of premiums at its counter in New York. But, without giving reasonable notice of such a change, it could not insist upon a forfeiture of the policies for want of prompt payment caused by their failure to give such notice. * * *

In the present case, it seems to us that the charge of the judge was in substantial conformity to the principles we have laid down. The insured, residing in the State of Mississippi, had always dealt with agents of the company located either in his own State or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such an agent; and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held, that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles

of his residence; but he had no knowledge of this fact; — at least such was the finding of the jury from the evidence. A stipulation that agents cannot waive forfeitures does not extend to a general agent.¹ Notice to pay at a certain bank is a waiver of a clause in the policy requiring payment to be made in New York and tender at the bank is good though it has failed.² If the agent collects premiums in advance his authority extending to the receipt of premiums, the payment will bind the company.”³

§ 367a. **Statutes Against Discrimination and Rebates.** — Statutes exist in many States forbidding discrimination between the policy-holders, and the giving of rebates in order to procure the insurance. Discussing a statute of this kind, and holding that it was not unconstitutional, the Court of Appeals of Kentucky said:⁴ “It is urged that section 656 of the Kentucky statutes is unconstitutional, because (a) it is a denial of the free right of trade and traffic, and therefore an abridgment of that right of liberty and property guarantied by the constitution; (b) that it prevents competition. This court in *Commonwealth v. Equitable Life Assur. Soc.*,⁵ had under consideration a petition to recover a penalty denounced in section 656. No question seems to have been raised in that case as to the constitutionality of the law. The court recognized that the commonwealth had the right to recover the penalty named in the section. In the case of *Commonwealth v. Long*,⁶

¹ *Bankers, etc., Assn. v. Stapp*, 77 Tex. 517; 14 S. W. R. 168; *Hartford L. & A. I. Co. v. Hayden*, 90 Ky. 39; 13 S. W. 585.

² *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.), 26 S. W. R. 280.

³ *Hartford L. & A. Ins. Co. v. Hayden*, 90 Ky. 39; 13 S. W. R. 585. See also *Bryan v. National L. Assn.*, 21 R. I. 149; 42 Atl. R. 513.

⁴ *Equitable L. Assur. Soc. v. Commonwealth*, 23 Ky. L. R. 2359; 67 S. W. R. 388.

⁵ 100 Ky. 341; 38 S. W. 491.

⁶ 30 S. W. 628.

the court had under consideration a proceeding under section 656. It recognized the validity of the statute by adjudging what court had jurisdiction of the proceeding to recover the penalty, although the constitutionality of the act was not questioned in that case. The legislature must be credited with the design, in the enactment of the statute under consideration, to benefit the public. Wise and prudent business men not only regard that there is an obligation on them to support and care for their families during their lives, but that it is provident and wise to protect them against want by life insurance. Of course, life is of uncertain duration. Policies of life insurance may run for 40 or 50 years or more, and those who buy them are deeply interested in having their policies issued in a solvent company. Every one who takes out a life insurance policy is interested in the solvency of the company. It is important that the business of the company should be successfully conducted, and that it should at the end of a long period be able, by collecting sufficient premiums, to meet the demands of the beneficiaries in the policies. The general assembly evidently thought that it was wise to prevent insurance companies and their agents from engaging in a cut-rate business, and thus avoid the dangers that might follow from the collection of insufficient amounts from the policy-holders. These, perhaps, are the considerations which influenced the general assembly to enact the statutes. Insurance companies are somewhat of a quasi-public nature, and the law-making department so regarded them, because it established an insurance bureau to inquire into their condition, and see that certain laws enacted for the benefit of the public were enforced. The argument of counsel for the appellant is largely based upon what we believe to be an erroneous conception of the statute. The statute does not prevent competition of insurance companies in the matter of fixing the rates to be charged for

policies of life or endowment insurance. It does not attempt to require or authorize insurance companies to make a uniform rate for persons of specific ages or classes of policies. The statute, in effect, declares that, when a company fixes a rate for the insurance of the same class and equal expectation of life, that rate shall be adhered to, without distinction or discrimination; that there shall be no special contract as to dividends or benefits payable on the policy; that whatever contract of insurance is made between the parties shall be written in the policy; that no company or agent shall pay or allow, as an inducement to insurants, any rebate on premiums payable on the policy, or any special favor or advantage in dividends or other benefits, or any valuable consideration or inducement whatever not specified in the policy contract of insurance." In considering a similar statute in Illinois the Supreme Court of that State has said:¹ "It is first contended that the court erred in not holding to be the law the proposition that if the rebate was allowed by an agent without the knowledge and consent of the plaintiff in error, and it had not ratified the act, it would not be liable. The contrary of this proposition was decided in the cases of *Franklin Life Ins. Co. v. People*.² The suit, although civil in form, was brought for a penalty for a violation of public law, and was, in effect, a criminal prosecution. The general rule is, as contended by counsel, that a principal is not liable criminally for an act of his agent committed without expressed or implied authority; but there have always been well-recognized exceptions to the rule, such as violations of the revenue laws, the creation or maintenance of nuisances, or the publication of libels. Well-recognized exceptions arise under police regulations

¹ *Metropolitan L. Ins. Co. v. People* (Ill.), 70 N. E. R. 643.

² 200 Ill. 594; 66 N. E. 378, and *Id.* 200 Ill. 619; 66 N. E. 379.

prohibiting acts hurtful to the comfort, welfare, and safety of society, such as the adulteration of food and drink, the sale of intoxicating liquor in violation of law,¹ or a failure to stop a train at a railroad crossing.² In such cases to give immunity to the principal would be to undermine and practically destroy the protection afforded to the people in general by the laws. The nature of the insurance business and the interest of the public in it are such as to subject it to regulation under the police power, and the statute which prohibits discrimination in favor of individuals between insurants of the same class and with equal expectation of life is a valid exercise of that power.³ A corporation can only act through an agent, and the act of the agent within the scope of the business intrusted to him is the act of the principal. If there is a violation of the statute, the law wisely throws the responsibility for the act upon the corporation, which has the best opportunity to prevent it; and it is liable whether it has authorized the act or not.”⁴ Under the Indiana statute the company has no right to make a special contract with one of its agents providing for special dividends, such a contract is void.⁵ And so where the insured was to be a member of the advisory board of the company and have special privileges as such member, it was held that the contract was void.⁶ A note given for part of a premium, the other part being rebated by the agent to the insured, is void.⁷ Where, however, the agent allowed half of his commission to the insured for his services in giving him the names of persons who would

¹ *Noecker v. People*, 91 Ill. 494.

² *Indianapolis & St. Louis Railroad Co. v. People*, 91 Ill. 452.

³ 22 Am. & Eng. Ency. of Law (2d Ed.), 933.

⁴ See also *Thompson v. N. Y. Life Ins. Co.*, 21 Oreg. 466; 28 Pac. R. 628.

⁵ *Robison v. Wolf*, 27 Ind. App. 683; 62 N. E. R. 74.

⁶ *State L. Ins. Co. v. Strong*, 127 Mich. 346; 86 N. W. R. 825.

⁷ *Heffron v. Daly* (Mich.), 95 N. W. R. 714.

possibly take out policies, such act was held not to be a violation of the Rhode Island law, as to rebates which is similar to that of other States.¹ An indictment which alleges that a rebate was given but not that it was not provided for in the policy, is bad.² The word "policy" used in the statute does not mean the "application."³ A note given by an agent for a rebate may, however, be binding on the company.⁴

§ 368. Where the Day of Payment Falls on Sunday. — If the day appointed for the payment of premium fall on Sunday the payment is in time if made on Monday, even though a loss occur on Sunday afternoon, and the policy provide that it shall be void if the premium be not paid before noon of the day fixed.⁵ This rule applies to notes given for premiums.⁶ But the Court of Appeals of Kentucky has held that because the day on which payment is to be made is Thanksgiving the insured is not excused from paying, because the statute of that State which provides that Thanksgiving day shall be treated as Sunday in regard to the presentment, acceptance and protesting of notes and bills does not apply to other business transactions or contracts.⁷

¹ *Quigg v. Coffy*, 18 R. I. 757; 30 Atl. Rep. 794.

² *State v. Scharzfeld*, 83 Me. 261; 22 Atl. Rep. 164.

³ *Kelley v. Mutual Life Ins. Co.*, 109 Fed. Rep. 56.

⁴ *Mutual L. Ins. Co. v. Herron*, 79 Miss. 381; 30 Sou. Rep. 691. See, as to construction of an agreement for rebate, *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522; 28 S. E. R. 879.

⁵ *Hammond v. American Mut. Life Ins. Co.*, 10 Gray, 306; *Howland v. Continental Life Ins. Co.*, 121 Mass. 499; *Taylor v. Germania Ins. Co.*, 2 Dill. 282; *Northey v. Bankers, etc., Assn.*, 110 Cal. 547; 42 Pac. R. 1079; *Campbell v. International Life Ass. Soc.*, 4 Bosw. 298. In this latter case is a learned review of all cases bearing upon the lawfulness of Sunday acts.

⁶ *Leigh v. Knickerbocker Life Ins. Co.*, 26 La. Ann. 436.

⁷ *National Mut. Ben. Assn. v. Miller*, 85 Ky. 83; 2 S. W. Rep. 900; 8 Ky. L. Rep. 31.

§ 369. **Premium Need not Always be Paid in Money: What Amounts to Payment.** — Unless otherwise provided for by the contract the payment of a premium may be in any mode, services, checks, or even depreciated funds, that may be accepted without objection by the insurers or their agents.¹ But generally authority to receive payment of a premium is not authority to receive anything but cash.² But if the agent is of general authority, or if the transaction is ratified by the company, payment can be made in any way.³ Payment by check which was dishonored has been held good,⁴ but not if the policy provides otherwise.⁵ A general agent may accept a note,⁶ and even though it be unpaid the policy is not forfeited;⁷ or he may extend credit,⁸ and so with an order upon a third party; if the company wishes to insist upon a forfeiture in consequence of its non-payment, it must give timely notice.⁹ If a receipt stipulate that if the draft, accepted in payment of the premium, be not paid, the receipt shall be of no effect, the policy will lapse if the draft is unpaid.¹⁰ And if there are mutual accounts between the parties, charging the premium

¹ See also *post*, § 383.

² *Equitable L. A. Soc. v. Cole*, 13 Tex. Civ. A. 486; 57 L. R. A. 455; 35 S. W. R. 720; *Tomesecsek v. Travelers Ins. Co.*, 113 Wis. 114; 88 N. W. R. 1013.

³ *Cameron v. Mut. Life & Trust Co. (Ia.)*, 96 N. W. R. 961. See also *Hewitt v. American Union, etc., Co.*, 73 N. Y. Supp. 105; *revers.* 70 N. Y. Supp. 1012.

⁴ *Ætna Life Ins. Co. v. Green*, 38 Up. Can. Q. B. 459.

⁵ *Neill v. Union Mut. Life Ins. Co.*, 45 Up. Can. Q. B. 593; *affirmed* 7 Ont. App. 171.

⁶ *New York Life Ins. Co. v. McCowan*, 18 Kan. 300; *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush, 430.

⁷ *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606.

⁸ *Pythian L. Assn. v. Preston*, 47 Neb. 374; 66 N. W. R. 445.

⁹ *National Benefit Assn. v. Jackson*, 114 Ill. 533; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; *Eury v. Standard, etc., Assn.*, 89 Tenn. 427; 14 S. W. R. 929.

¹⁰ *Life Insurance Co. v. Pendleton*, 112 U. S. 696; 115 U. S. 339.

to the insured is payment.¹ And where the agent, who had dealings with the firm of the assured, told him that he had taken care of the premium, this was held to be payment.² Where the insured, in pursuance of instructions from the company, delivers the amount of the premium to an express company, the premium is paid from the time of such delivery.³ But ordinarily where a premium is sent by express the latter company is agent of the insured.⁴ Part payment of a premium will not keep a policy in force *pro tanto*; ⁵ nor is a cash payment and notes for the deferred quarterly premiums payment if the notes be not paid; ⁶ nor writing a letter with the money inclosed, if it be not delivered to an express company, when the insured was instructed to pay to the express company; ⁷ nor a payment in other than money to an agent under circumstances amounting to fraud upon the insurer.⁸ But ordinarily, the payment is good if the agent receive the equivalent offered, be it even depreciated funds,⁹ or note.¹⁰ Unless otherwise

¹ *Continental Life Ins. Co. v. Ashcraft*, 18 W. N. C. 97; *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. 351; *Butler v. Am. Popular Life Ins. Co.*, 10 Jones & S. 342. But see *Wright v. Equitable Life Ins. Co.*, 9 Jones & S. 1.

² *Chickering v. Globe Mut. Life Ins. Co.*, 116 Mass. 321.

³ *Currier v. Ins. Co.*, 53 N. H. 538; *Whitley v. Piedmont & Arlington Ins. Co.*, 71 N. C. 480.

⁴ *State v. Conn. Mut. L. Ins. Co.*, 106 Tenn. 282; 61 S. W. R. 75. Where premiums are collected by a bank, see *Bankers L. Ins. Co. v. Robbins*, 55 Neb. 117; 75 N. W. R. 585.

⁵ *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167; *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300. But see *John Hancock Mut. L. Ins. Co. v. Schlink*, 175 Ill. 284; 51 N. E. R. 795; *affg.* 74 Ill. App. 187.

⁶ *Werner v. Metropolitan Life Ins. Co.*, 11 Daly, 176; *Howard v. Continental Life Ins. Co.*, 48 Cal. 229.

⁷ *Donald v. Life Ins. Co.*, 4 S. C. 321.

⁸ *Hoffman v. John Hancock Life Ins. Co.*, 92 U. S. 161.

⁹ *Sands v. New York Life Ins. Co.*, 50 N. Y. 626; *New York Life Ins. Co. v. Clopton*, 7 Bush, 179.

¹⁰ *Mut. Ben. Life Ins. Co. v. French*, 30 Ohio St. 240; *Pitt v. Berk-*

provided payments of premiums are to be made at the domicile of the company.¹ Payment by check in accordance with custom is good.² But where the company authorizes remittances by mail the payment is made when the letter containing the remittance is deposited in the post-office.³ In the case first cited⁴ the court says: "It is also very clear that the defendant authorized, and in substance requested, the plaintiff to make the payment in question, as well as previous payments by mail. It sent each time to the plaintiff an envelope, directed to the company, and requested him to use it in sending his remittance; and the payments had previously been so made. We have, then, in effect, a case where, by the authority of the creditor, a payment is sent

shire Life Ins. Co., 100 Mass. 500; *Mowry v. Home Ins. Co.*, 9 R. I. 346; *Moffatt v. Reliance Mut. Life Ins. Soc.*, 45 Up. Can. Q. B. 561; *Mut. L. Ins. Co. v. Logan*, 87 Fed. R. 637; 31 C. C. A. 172; 57 U. S. App. 18. And even where the agent converted the note. *Mich. Mut. L. Ins. Co. v. Hall*, 60 Ill. App. 159. And where a note for a rebate was given by the agent. *Mutual L. Ins. Co. v. Herron*, 79 Miss. 381; 30 Sou. R. 691. A note given by the agent but not delivered is not payment. *Reese v. Fidelity M. L. Assn.*, 111 Ga. 482; 36 S. E. R. 637. See also *Smith v. N. Eng. M. L. Ins. Co.*, 11 C. C. A. 411; 63 Fed. R. 769; 28 U. S. App. 48.

¹ *Insurance Co. v. Davis*, 95 U. S. 425.

² *Hartford L. & A. Co. v. Eastman*, 54 Neb. 90; 74 N. W. R. 394. See also *Tooken v. Security Trust Co.*, 26 App. Div. 372; 49 N. Y. Supp. 814. Where a post dated check was received. *Maxson v. Llewellyn*, 122 Cal. 195; 54 Pac. R. 732. Where facts held not to amount to payment. *Mut. L. Ins. Co. v. Oliver*, 95 Va. 445; 28 S. E. R. 594; *Sullivan v. Germania L. Ins. Co.*, 15 Mont. 522; 39 Pac. R. 742.

³ *Primean v. National Assn.*, 28 N. Y. Supp. 794; *Kenyon v. Assn.*, 122 N. Y. 247; 25 N. E. R. 299; *McCluskey v. National Life Assn.*, 28 N. Y. Supp. 231; see also *Hollowell v. Life Ins. Co. of Va.*, 126 N. C. 398; 35 S. E. R. 616; *N. W. L. Ins. Co. v. Sturdivant*, 24 Tex. Civ. A. 331; 59 S. W. R. 61; *Guilfoyle v. Natl. L. Assn.*, 36 App. Div. 343; 55 N. Y. Supp. 236; *Kenyon v. Natl. Assn.*, 39 App. D. 276; 57 N. Y. Supp. 60; *Kendrick v. Mut. Ben. L. Ins. Co.*, 124 N. C. 315; 32 S. E. R. 728.

⁴ *Primean v. National Life Assn.*, *supra*.

by mail. In such a case, after deposit in the post-office, it is at the risk of the creditor, and the payment is deemed to have been made at the time of the deposit.¹ In *Palmer v. Insurance Co.*,² it was held that, if money was sent to the defendant by mail, according to its request, it was at the defendant's risk, and the same thing was held as to a check in *Kenyon v. Association*.³ If the payment in question took effect at the time of deposit, then there was no default, and the defendant would not be in a position to claim a forfeiture. It had a right to receive it, or agree to receive it, at some other place than its home office, or out of the State.⁴ Authority or request to send by mail was a waiver of the provisions for payment at the home office. But it is argued that the letter should have been mailed in time, so that by the regular course of mail it would have reached the defendant on the first day of February. This depends on whether the authority from defendant to the plaintiff to make payment by mail was restricted in that way. There was no such restriction, in terms at least, in the notice the defendant sent to the plaintiff. That stated that the premium was due and payable at the home office, or at Hartford, on or before the first day of February. It also, in effect, stated that the plaintiff might make payment by mail in Watertown checks. It did not state that, if payment was made in that way, the mailing must be made long enough before the first of February to enable the letter to reach the defendant by the first."⁵

¹ 2 Greenl. Ev., § 525; 2 Pars. Cont. 620; 2 Chit. Cont. (11th Ed.) 1106; *Morgan v. Richardson*, 13 Allen, 410, 411; *Buell v. Chapin*, 99 Mass. 596; *Colvin v. Association*, 66 Hun, 543; 21 N. Y. Supp. 734.

² 84 N. Y. 71.

³ 122 N. Y. 247; 25 N. E. 299.

⁴ *Hastings v. Insurance Co.*, 138 N. Y. 474, 479; 34 N. E. R. 289.

⁵ Other cases bearing on the question of sufficiency of payment are *Baldwin v. Provident, etc., Soc.*, 162 N. Y. 636; 57 N. E. R. 1103; *East v. Prudential Ins. Co.*, 11 App. Div. 190; 42 N. Y. Supp. 584; *Bishop v.*

§ 370. **Payment of Premium after Death of Insured: Days of Grace.** — It has been held that, if the insured has been led to believe that prompt payment of premiums will not be insisted upon, payment can be made of a premium after it is due and even though the insured may be dead.¹ Where by the terms of the policy, the premium was due at a certain time or within thirty days thereafter, payment can be made during the thirty days although the insured is dead.² A policy will not be forfeited for mere non-payment of assessments, if paid after the death of the insured in pursuance of a request made by him when alive, which assessments are retained by the insurer until after suit brought.³ If the overdue premium be paid after the death of the insured, under circumstances which make it a fraud on the company, it will not be liable; as where, after the insured had on demand refused to pay the premium and a few days afterwards died, a friend paid the amount to the company, which, not knowing of the death, accepted it.⁴ But it has been said that, where days of grace are given, after the premium is due, for its payment, if the insured wishes to take advantage of the delay he must do so at his own risk. If he dies, therefore, within the period of grace with the premium unpaid the policy is gone. This is the

Life Ins. Co., 85 Mo. App. 302; *Dennison v. Masons, etc., Soc.*, 59 App. Div. 294; 69 N. Y. Supp. 291; *Dooyns v. Bay State, etc., Assn.*, 144 Mo. 95; 45 S. W. R. 1107; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341; 75 N. W. R. 862; *Thum v. Wostenholme*, 61 Pac. R. 537; 21 Utah, 446.

¹ *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304; *Froelich v. Atlas L. Ins. Co.*, 47 Mo. 406. In this case the money was received without objection by the company. To the same effect is *Union Cent. L. Ins. Co. v. Duval* (Ky.), 46 S. W. R. 434.

² *Rogers v. Capitol L. Ins. Co.*, 1 W. N. C. 589; *Bankers L. Assn. v. Stapp*, 77 Tex. 517; 14 S. W. R. 168. See also *Mut. Res. F. L. Assn. v. Lovenberg*, 24 Tex. Civ. A. 355; 59 S. W. R. 314; *Brown v. Mut. R. L. Assn.*, 137 Cal. 278; 70 Pac. R. 187.

³ *Erdmann v. Mut. Ins. Co., etc.*, 44 Wis. 376.

⁴ *Miller v. Union Cent. L. Ins. Co.*, 110 Ill. 102.

reason that the right to make the payment is personal in such cases and cannot be delegated and closes with the death of the insured. In practice, however, it is seldom that the delay granted is considered a period of grace and where it has been so held some special wording of the policy justified it. A distinction is made between mere days of grace and an extension of the time of payment, or a time allowed by the contract for the payment, as where the premium was to be paid at a certain time or thirty days thereafter; in the latter case payment can be made during any part of the period although a loss has meantime happened.¹

§ 371. **When Note is Taken for Premium.** — If an insurance company takes a note for the premium when it falls due, and gives therefor renewal receipts, the transaction evidences a loan of money, and unless otherwise stipulated in the policy, the policy continues in force, though the note be not paid, and the company cannot afterwards insist on its forfeiture. This is especially the case if the note of some other person than the assured be taken.²

¹ *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 277; *Pritchard v. Merchants', etc., Soc.*, 3 C. B. (N. s.) 622; *Simpson v. Accidental Death Ins. Co.*, 2 C. B. (N. s.) 257; *Robert v. New England, etc., Ins. Co.*, 1 Disney, 355; *McDonnell v. Carr*, 1 Hays & Jones Irish R. 256. And see *Worden v. Guardian, etc., Ins. Co.*, 7 Jones & Sp. 317, where the distinction mentioned in the text is made. In *Want v. Blunt*, 12 East, 183, the policy provided that the payment should be made at certain times "during the life" of the insured. Construing this it was held that the insured must be living at the time of the payment.

² *Mich. Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Tabor v. Mich. Mut. L. Ins. Co.*, 44 Mich. 324; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504; *Mut. Ben. Insurance Co. v. French*, 30 Ohio St. 240; *Thaw v. Republic L. Ins. Co.*, 69 N. Y. 286; *Tutt v. Covenant L. Ins. Co.*, 19 Mo. App. 677; *Timayenis v. Union Mut L. Ins. Co.*, 21 Fed. Rep. 223; *Trager v. Louisiana Equitable L. Ins. Co.*, 31 La. Ann. 235. But see *St. Louis Mut. L. Ins. Co. v. Griggsby*, 10 Bush, 310; *Stepp v. National, etc., Co.* (S. C.), 16 S. E. 134; *Mass. Ben. L. Assn. v. Robinson*, 104 Ga. 256; 30 S. E. 918; 42 L. R. A. 261; *Galvin v. Union Cent. L. Ins. Co.*, 74 S. W.

Where, however, the policy provides that if a note or check received for any premium be not paid the policy shall be forfeited, the insurance falls if the paper be not paid, and the company is not bound to give notice of the maturity of such paper.¹ Nor, unless so agreed, is the company bound to return the note.² Where a premium note given by the husband on a policy payable to the wife has a forfeiture clause more onerous than the conditions contained in the policy, it will not be binding without the consent of the wife.³ An interesting case was decided in the United States Circuit Court for Vermont, the facts being as follows:⁴ A mutual life insurance company insured by an

R. 275; 24 Ky. L. R. 2452; *Stewart v. Union M. L. Ins. Co.*, 155 N. Y. 257; 42 L. R. A. 147; 49 N. E. R. 876; *Roberts v. Security Co.*, 1 Q. B. 111; *Union Cent. L. Ins. Co. v. Taggart*, 55 Minn. 95; 56 N. W. R. 579; *Washington L. Ins. Co. v. Menefee*, 107 Ky. 244; 53 S. W. R. 260; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636; 40 S. W. R. 1092.

¹ *Thompson v. Insurance Co.*, 104 U. S. 252; affirming 2 Woods, 547; *Neill v. Union Mut. L. Ins. Co.*, 45 Up. Can. Q. B. 593; *Gorton v. Dodge Co., etc., Ins. Co.*, 39 Wis. 121; *Imperial L. Ins. Co. v. Glass*, 96 Ala. 568; 11 South R. 671; *Banholzer v. New York Life Ins. Co.*, 74 Minn. 387; 77 N. W. R. 295; *Economical L. Ins. Co. v. Spinning*, 116 Ia. 385; 89 N. W. R. 1095; *Manhattan L. Ins. Co. v. Pontecost*, 104 Ky. 642; 49 S. W. R. 425; *Leeper v. Franklin L. Ins. Co.*, 93 Mo. App. 602; 67 S. W. R. 941; *Seeley v. Union Cent. L. Ins. Co.*, 10 Pa. Super. Ct. 270; *Manhattan L. Ins. Co. v. Myers*, 109 Ky. 372; 5 S. W. R. 30; *Manhattan L. Ins. Co. v. Wright*, 126 Fed. R. 82; *Fenn v. Union M. L. Ins. Co.*, 48 La. Ann. 541; 19 Sou. R. 623; *Sullivan v. Conn. Ind. Co.*, 101 Ga. 809; 29 S. E. R. 41; *Union Cent. L. Ins. Co. Hughes (Tex. C. A.)*, 70 S. W. R. 1010; *Behling v. N. W. M. L. Ins. Co.*, 117 Wis. 24; 93 N. W. R. 800; *National L. Assn. v. Brown*, 103 Ga. 382; 29 S. E. R. 927; *Union Cent. L. Ins. Co. v. Wilkes (Tex. C. A.)*, 47 S. W. R. 546.

² *Deppe v. Southern Mut. L. Ins. Co.*, 8 Ky. L. Rep. 57; *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 160; *How v. Mutual L. Ins. Co.*, 80 N. Y. 32.

³ *Union Cent. L. Ins. Co. v. Buxer*, 62 Ohio St. 385; 57 N. E. R. 66; 49 L. R. A. 737. If forfeiture results from non-payment of the note no notice is required. *Manhattan L. Ins. Co. v. Savage (Ky.)*, 63 S. W. R. 483; *Ia. Life Ins. Co. v. Lewis*, 187 U. S. 335.

⁴ *Brooks v. Phoenix Mut. L. Ins. Co.*, 16 Blatchf. 182.

endowment policy, the life of a husband for the sole benefit of his wife, in an amount payable to her on a day named. For four years the company accepted the notes of the husband as payment of one-half of the annual premiums, the notes being given on the representation by the company that they would be paid by dividends and pledging the policy and all payments that might become due thereon, to the company for the payment of such notes. In a suit by the husband and wife, in right of the wife, against the company to recover the amount insured, the plaintiffs claimed that the dividends declared, if credited on the notes, would pay them in full; the defendant, however, claimed, that the amount due on the policy was the sum insured, less the amount due on the notes. The court held that the notes were not binding on the wife and were not to be deducted from the policy, she never having done anything to qualify her right to it. If the agent take, without authority, the note of the assured for the premium the loss, if the note be not paid, falls on him and the non-payment does not affect the policy.¹ If for any reason the agreement that non-payment of the note shall forfeit the policy is bad there is no consideration for the extension.²

¹ *Griffith v. New York L. Ins. Co.*, 101 Cal. 627; 36 Pac. R. 113; *Kranse v. Equitable L. Ass. Soc.*, 99 Mich. 461; 58 N. W. R. 496. See also *Union Cent. L. Ins. Co. v. Wood*, 11 Ind. App. 335; 37 N. E. R. 180, where the company collected the note by suit.

² *Fidelity M. L. A. v. Price* (Ky.), 77 S. W. R. 384. As to the effect of extensions and renewals, see *First Natl. Bank v. Getz*, 96 Ia. 139; 64 N. W. R. 799; *Mut. L. Ins. Co. v. Smith*, 98 Ga. 771; 25 S. E. R. 727; *Forbes v. Union Cent. L. Ins. Co.*, 151 Ind. 89; 51 N. E. R. 84; *McDonald v. Prov. Savings, etc., Soc.*, 108 Wis. 213; 84 N. W. R. 154. As to return of note see *Mut. L. Ins. Co. v. Gorman*, 19 Ky. L. R. 295; 40 S. W. R. 571. As to defenses on premium notes: *Shedden v. Head*, 110 Ga. 461; 35 S. E. R. 707; *Home L. Ins. Co. v. Walsh*, 36 Nova Sc. (Can.), 73; *Wood v. Confederation, etc.*, 2 N. B. Eq. 217; *Muller v. State L. Ins. Co.*, 27 Ind. App. 45; 60 N. E. R. 958; *Dunn v. Abrams*, 97 Ga. 762; 25 S. E. R. 766.

§ 372. The Same Subject: Premium Notes Proper.—

In many companies part of the premium is regularly paid by what is called premium notes. A premium note executed the same time as the policy is part of it.¹ The policy itself generally provides as to these, and if it does the agreement of the parties prevails. A premium note is not delivered while held by a third party to whom it was given to carry to the agent.² If the policy provides that if a premium note be not paid at maturity the policy shall be void, non-payment of such note forfeits the policy.³ No affirmative action is required.⁴ But payment can be extended and an agreement before default to extend payment is founded upon a sufficient consideration.⁵ But such agreement must be clearly expressed or it will not be enforced.⁶ It is unnecessary to make demand for the payment of a premium note, unless so provided in the contract.⁷ If the company receives money on an overdue premium note from an agent without inquiry the forfeiture is saved.⁸ In contracts of life insurance the time for the payment of interest on premium notes is of the very essence of the contract; and if, by the terms of the policy, it is to become void

¹ *Laughlin v. Fidelity M. L. Assn.*, 8 Tex. Civ. A. 448; 28 S. W. R. 411.

² *Brown v. Ins. Co.*, 59 N. H. 298.

³ *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283; *Kerns v. New Jersey M. L. Ins. Co.*, 86 Pa. St. 171; *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32; *Sanderson v. New England L. Ins. Co.*, 1 Disn. 355; *McAllister v. New England M. L. Ins. Co.*, 101 Mass. 558; *Bane v. Travelers' Ins. Co.*, 7 Ky. L. Rep. 750.

⁴ *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335.

⁵ *Mich. Mut. L. Ins. Co. v. Custer*, 128 Ind. 25; 27 N. E. R. 124; citing *Homer v. Ins. Co.*, 67 N. Y. 478; *Wyman v. Ins. Co.*, 119 N. Y. 274.

⁶ *New England Mut. L. Ins. Co. v. Hasbrook*, 32 Ind. 447; *Cowles v. Insurance Co.*, 63 N. H. 300; *Kansas Prot. Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275.

⁷ *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 160; 4 Daly, 512; *Deppe v. Southern Mut. L. Ins. Co.*, 8 Ky. L. Rep. 57.

⁸ *Hodson v. Guardian L. Ins. Co.*, 97 Mass. 144.

upon a failure to pay such interest at the time specified, non-payment of interest works a forfeiture against which equity will not relieve.¹ Such a provision is not usurious nor unconscionable.² A condition, however, that non-payment of interest on a premium note shall forfeit the policy cannot be inserted in a paid-up policy given in exchange for another, if the terms of the original policy do not warrant it.³ And non-payment of interest will not be cause of forfeiture unless so stipulated.⁴ Where dividends are due the assured they should be applied first to the payment of interest on the premium note and then to the principal,⁵ unless there has been a well-defined custom to the contrary.⁶ Where the premium notes were considered as loans by the company it was held by the Supreme Court of Vermont, in construing the policy, that non-payment of interest on such notes did not cause a forfeiture although it was apparently so provided in the policy.⁷ Where the policy provided for forfeiture if interest on the premium notes was not paid, and by indorsement the policy was

¹ *Knickerbocker L. Ins. Co. v. Dietz*, 52 Md. 16; *Patch v. Phoenix M. L. Ins. Co.*, 44 Vt. 481; *Knickerbocker L. Ins. Co. v. Harlan*, 56 Miss. 512; *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flap. 559.

² *Attorney-General v. North America L. Ins. Co.*, 82 N. Y. 172; *Ins. Co. v. Robinson*, 40 Ohio St. 270; *Russum v. St. L. Mut. L. Ins. Co.*, 1 Mo. App. 228; *Nettleton v. St. Louis L. Ins. Co.*, 7 Biss. 293, where it is suggested that there may be cases where equity would relieve against forfeiture for non-payment of interest. *Smith v. St. L. Mut. L. Ins. Co.*, 2 Tenn. Ch. 727. Opposed to these cases are *St. L. Mut. L. Ins. Co. v. Grigsby*, 10 Bush, 310; *Northwestern Mut. Ins. Co. v. Fort*, 82 Ky. 269; *Cowles v. Continental L. Ins. Co.*, 63 N. H. 300.

³ *Cole v. Knickerbocker L. Ins. Co.*, 63 How. Pr. 442.

⁴ *Gardner v. Union Cent. L. Ins. Co.*, 5 Fed. Rep. 430.

⁵ *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 727.

⁶ *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flap. 559.

⁷ *Bruce v. Continental L. Ins. Co.*, 68 Vt. 253; *Insurance Co. v. Bonner*, 36 Ohio St. 51; *Eddy v. Phoenix M. L. Ins. Co.*, 65 N. H. 27; 18 Atl. R. 89. But such interest is indebtedness to be deducted when the policy matures. *Idem*.

made paid-up for a certain amount, it was held that the proviso continued and the policy was made void by the non-payment of interest on the premium notes.¹ And so where a new policy was taken containing the provision of forfeiture for non-payment of interest on the premium note.² And such a contract is not unconscionable.³

§ 373. **Non-Forfeitable and Paid-up Policies.** — Many policies are called “non-forfeitable” although, by their terms, so many conditions and limitations are imposed, that the word means little except that they are either subject to the Massachusetts law, of which we shall soon speak, or that after a certain number of premiums are paid, they may be exchanged for paid-up policies or become paid up by their own terms for a certain percentage of the original amount. The questions arising out of these policies are chiefly those of construction, and the adjudications upon these questions are individual rather than upon general principles. In many States the right to paid-up policies, or extensions, is secured by statute and of these rights we shall speak in the next section. Where the right is contractual only all the conditions prescribed in the policy must be complied with and such conditions are binding upon minors.⁴

¹ *Holman v. Continental L. Ins. Co.*, 54 Conn. 195; all the previous cases on the subject being here fully reviewed.

² *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480.

³ *Fowler v. Metropolitan L. Ins. Co.*, 116 N. Y. 389; 22 N. E. R. 576. Other cases where particular contracts have been construed are: *King v. Mayes* (Ind. T.), 58 S. W. R. 573; *Weed v. Cumming*, 198 Pa. St. 442; 48 Atl. R. 409; *Madison v. N. W. Mut. L. Ins. Co.* (Cal.), 75 Pac. R. 113; *Hogue v. N. W. M. L. Ins. Co.*, 114 Fed. R. 778.

⁴ *Mut. Benefit L. Ins. Co. v. Harvey* (Ky.), 79 S. W. R. 218; *Wilcox v. Equitable L. A. Soc.*, 58 App. Div. 529; 67 N. Y. Supp. 269; *Crutchfield v. Union L. Ins. Co.*, 23 Ky. L. R. 2300; 67 S. W. R. 67; *Mut. Ben. L. Ins. Co. v. First Natl. Bk.*, 24 Ky. L. R. 580; 69 S. W. 1; *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658; 65 N. E. R. 15; *Bonner v. Mut. L. Ins. Co.* (Miss.), 36 Sou. R. 538.

Where a new policy, issued on receipt and surrender of the old one, conforms to the terms of the old in respect to forfeiture for non-payment of interest on a premium note, this provision will be upheld.¹ And no notice of the time when such interest is due need be given.² Where the policy provides that a certain number of "complete annual premiums" must be paid to entitle the policy to be exchanged, payment of the premium notes given for a portion of the premium has been held unnecessary, to bring the payment of the premium within the term.³ Under the provisions of a policy of this kind, where it was provided that upon default in the payment of any annual premium it could be exchanged for a paid-up policy for as many tenths as there had been annual premiums paid, it was held that the premium notes could not be deducted from the amount of the new policy.⁴ Whether the old policy must be surrendered or not, to obtain the benefit of a provision in a non-forfeiting policy, which provides that, upon default in the payment of any premium, it may be surrendered, and a new one for a specified proportional part issued, within the prescribed time mentioned in the old, depends upon the wording of the contract. In one case,⁵ it was held that such a surrender within twelve months was unnecessary, but there the language of the policy was not clear. In a

¹ *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480; 9 N. East. Rep. 35; *Holman v. Continental L. Ins. Co.*, 54 Conn. 195; *Moser v. Phoenix M. L. Ins. Co.*, 2 Mo. App. 408; *Ewald v. Northwestern Mut. L. Ins. Co.*, 60 Wis. 431; *Russum v. St. L. Mut. L. Ins. Co.*, 1 Mo. App. 228.

² *Heim v. Metropolitan L. Ins. Co.*, 7 Daly, 536.

³ *Ohde v. Northwestern Mut. L. Ins. Co.*, 40 Ia. 357. Otherwise if the policy so stipulate. *Van Norman v. N. W. Mut. L. Ins. Co.*, 51 Minn. 57; 52 N. W. R. 988.

⁴ *Dutcher v. Brooklyn L. Ins. Co.*, U. S. Cir. Ct. E. D. Mo., 3 Dill. 87; 4 Ins. L. J. 812; affirmed *Ins. Co. v. Dutcher*, 95 U. S. 269. But the unpaid premium notes would be a lien on the new policy. See also *Ohde v. Northwestern L. Ins. Co.*, 40 Ia. 357.

⁵ *Chase v. Phoenix Mut. L. Ins. Co.*, 67 Me. 85.

later case in the same State¹ it was held that a surrender within the limited twelve months was unnecessary, if the insured died during such period.² Where, by a separate instrument, the company agreed, after the payment of three annual premiums, to issue a paid-up policy for a proportionate amount on surrender of the policy, "on or before it shall expire by the non-payment of the fourth or any subsequent premium," it was held that the word "on" should be construed to mean the instant of the expiration of the policy and that time was of the essence of the contract and the assured was not entitled to a paid-up policy on the surrender of the original policy after it had expired.³ And generally the right to demand a paid-up policy must be exercised within the time prescribed or it will be lost.⁴ And the old policy must be surrendered, if the contract so provides, as a condition precedent to the right.⁵ The

¹ *Dorr v. Phoenix M. L. Ins. Co.*, 67 Me. 438.

² *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543; reversing 16 Hun, 317.

³ *Sheerer v. Manhattan L. Ins. Co.*, 20 Fed. Rep. 886; 16 Fed. Rep. 720; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177; *People v. Widows'*, etc., *Ins. Co.*, 15 Hun, 8; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Koehler v. Phoenix Mut. L. Ins. Co.*, 4 Ky. L. Rep. 903. See as to effect of stipulations in premium note: *Drury v. N. Y. Life Ins. Co. (Ky.)*, 74 S. W. R. 663; 61 L. R. A. 714; *New York L. Ins. Co. v. Meinken (Ky.)*, 80 S. W. R. 175.

⁴ *Hudson v. Knickerbocker L. Ins. Co.*, 28 N. J. Eq. 167; *Attorney-General v. Continental L. Ins. Co.*, 93 N. Y. 70; *Universal L. Ins. Co. v. Whitehead*, 58 Miss. 226; *Hanthorne v. Brooklyn L. Ins. Co.*, 5 Mo. App. 73; *Bussing v. Union Mut. L. Ins. Co.*, 34 Ohio St. 222. But see *Southern Mut. L. Ins. Co. v. Montague*, 2 S. W. Rep. 443; 8 Ky. L. Rep. 579; *Germania L. Ins. Co. v. Sauer*, 7 Ky. L. Rep. 297; *Coffey v. Universal L. Ins. Co.*, 10 Biss. 354; 7 Fed. Rep. 301; *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush, 51; see also *Hexter v. U. S. L. Ins. Co.*, 91 Ky. 356; 15 S. W. R. 863; *N. W. Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427; 17 S. W. R. 796; and *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80; 42 S. W. R. 1097; 39 L. R. A. 504.

⁵ *McLaughlin v. Equitable, etc., Soc.*, 38 Neb. 725; 57 N. W. R. 557; *Universal L. Ins. Co. v. Devore*, 88 Va. 778; 14 S. E. R. 532; *Manhattan L. Ins. Co. v. Olmsted*, 10 Kan. App. 196; 63 Pac. R. 279.

new paid-up policy is merely a continuation of the old.¹ The conditions of the old policy apply to the new or the commuted portion.² If there are no words of restriction, as to time of application therefor, then the assured is entitled to a paid-up policy at any time he may ask for it.³ But the right may be lost by delay, if unreasonable.⁴ If the policy has a stipulation that by non-payment of premium it shall commute for a special amount there is no need for a new policy,⁵ nor does action accrue until the death of assured.⁶ A contract for a paid-up policy may be specifically enforced.⁷ But unless the company has bound itself to issue a paid-up policy it is under no obligation to do so.⁸

¹ *McDonnell v. Ala. Gold L. Ins. Co.*, 85 Ala. 401; 5 South. R. 120.

² *Merritt v. Cotton States Ins. Co.*, 55 Ga. 103.

³ *Christy v. Homœopathic M. L. Ins. Co.*, 93 N. Y. 345; *Lovell v. St. L. Mut. L. Ins. Co.*, 111 U. S. 264.

⁴ *Wells v. Vermont L. Ins. Co.*, 28 Ind. App. 620; 62 N. E. R. 501; 63 N. E. R. 578; *Washington L. Ins. Co. v. Miles*, 112 Ky. 743; 66 S. W. R. 740; *Washington L. Ins. Co. v. Glover (Ky.)*, 78 S. W. R. 146; *Equitable L. A. Soc. v. Warren, etc., Bank (Ky.)*, 75 S. W. R. 275; 76 S. W. R. 391.

⁵ *Kerr v. Union Mut. L. Ins. Co.*, 23 N. Y. Supp. 619.

⁶ *Lyon v. Union Mut. L. Ins. Co.*, 17 N. Y. Supp. 756.

⁷ *Stanley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 294; *Farley v. Union Mut. L. Ins. Co.*, 41 Hun, 303; *Missouri Valley L. Ins. Co. v. Kelso*, 16 Kan. 481; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *Dutcher v. Brooklyn L. Ins. Co.*, 3 Dillon, 97; affirmed 95 U. S. 79; *Bruce v. Continental L. Ins. Co.*, 58 Vt. 253.

⁸ *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. App. 469. For other distinctions in regard to paid-up policies, see *Johnson v. Southern Mut. L. Ins. Co.*, 79 Ky. 403; *Hughes v. Piedmont & Arlington L. Ins. Co.*, 55 Ga. 111; *Mut. L. Ins. Co. v. Bratt*, 55 Md. 200; *Symonds v. Northwestern L. Ins. Co.*, 23 Minn. 491; *Fithian v. Same*, 4 Mo. App. 386; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *White v. Penn. Mut. L. Ins. Co.*, 6 Mo. App. 587; *Mound City, etc., Co. v. Twining*, 19 Kan. 349; 12 *Id.* 475; *Northwestern M. L. Ins. Co. v. Ross*, 63 Ga. 199; *Hull v. Same*, 39 Wis. 397; *Northwestern Mut. L. Ins. Co. v. Little*, 56 Ind. 504; *Holly v. Metropolitan L. Ins. Co.*, 105 N. Y. 437; 11 N. East. Rep. 507; *Ins. Co. v. Robertson*, 40 Ohio St. 270; *Knapp v. Homœopathic Mut. L. Ins. Co.*, 117 U. S. 411. As to rights to dividends and their applica-

Where in ignorance of the death of the assured the policy was surrendered for a paid-up policy it was held that the first policy should be reinstated.¹ On surrender of a policy payable to the wife she is entitled to the proceeds.² And the wife is not bound by the act of the husband in accepting smaller benefits than she is legally entitled to.³

§ 373a. **Damages for Breach of Contract to Issue Paid-Up Policy.** — In actions for breach of contract to issue a paid-up policy nominal damages only can be recovered in the absence of other proof; the damages will not be the amount of premiums paid.⁴ The question in such cases is largely one of construction; generally the measure of damages is not the full amount of premiums that have been

tion see *Union Cent. L. Ins. Co. v. Caldwell*, 68 Ark. 505; 58 S. W. R. 355; *Straube v. Pacific M. L. Ins. Co.*, 123 Cal. 677; 56 Pac. R. 546. When policy is lost. *Lindenthal v. Germania L. Ins. Co.*, 26 Misc. 443; 57 N. Y. Supp. 472. As to rights after default. *Tate v. Mut. Ben. L. Ins. Co.*, 131 N. C. 389; 42 S. E. R. 892; *Lindenthal v. Germania L. Ins. Co.*, 174 N. Y. 76; 66 N. E. R. 629; revers. 73 N. Y. Supp. 1139. As to grace. *Prudential Ins. Co. v. Devoe (Md.)*, 56 Atl. R. 809. As to general construction. *Wilcox v. Equitable L. A. Soc.*, 173 N. Y. 50; 65 N. E. R. 857; reversg. 55 App. Div. 529; 67 N. Y. Supp. 269; *Manhattan L. Ins. Co. v. Patterson*, 109 Ky. 624; 60 S. W. R. 383; 53 L. R. A. 378; *Equitable, etc., Soc. v. Evans*, 25 Tex. C. A. 563; 64 S. W. R. 74; *Kiune v. Mich. Mut. L. Ins. Co.*, 92 Wis. 335; 66 N. W. R. 359; *Mut. Ben. L. Ins. Co. v. First Natl. Bk. (Ky.)*, 74 S. W. R. 1066; 25 Ky. L. R. 172; *Blake v. National L. Ins. Co.*, 123 Cal. 470; 56 Pac. R. 101; *Union Cent. L. Ins. Co. v. Wilkes*, 92 Tex. 468; 49 S. W. R. 1038; *Rife v. Union Cent. L. Ins. Co.*, 129 Cal. 455; 62 Pac. R. 48; *Equitable L. A. Soc. v. Spillman*, 22 Ky. L. R. 183; 56 S. W. R. 710; *Bryant v. Mut. Ben. L. Ins. Co.*, 109 Fed. R. 748; *McLaughlin v. Equitable L. A. Soc.*, 38 Neb. 725; 57 N. W. R. 557. In most of the cases referred to in the last two sections of the text other points are discussed besides those in support of which they are cited.

¹ *Reigel v. American L. Ins. Co.*, 140 Pa. St. 193; 21 Atl. R. 393.

² *Sheets v. Sheets*, 4 Colo. App. 450; 36 Pac. R. 310.

³ *Mut. L. Ins. Co. v. Dunn*, 106 Ky. 591; 51 S. W. R. 20. See also *Union Cent. L. Ins. Co. v. Buxer*, 62 Ohio St. 385; 57 N. E. R. 66; 49 L. R. A. 737.

⁴ *Wat rs v. Phoenix Mut. L. Ins. Co.*, 16 Blatch. 228.

paid but the fair cash value of "new paid-up policies at the time of the breach of the contract."¹ The amount of damages has also been held to be determinable by taking into consideration the age of the assured, the amount of annual premiums paid, and required to be paid during the continuance of the policy, the probable period of continuance, and the time the policy had run.² And still in another case the measure of damages was held to be the proportionate part of the reserve fund;³ and in another case what would be sufficient to purchase in a good and responsible company just such a policy as was stipulated.⁴ Where the contract provided that after the payment of two annual premiums the assured might exercise the option of receiving a paid-up policy for the total amount of premiums paid, it was held,⁵ that the insured was entitled to the paid-up policy according to the aggregate amount paid in by him though such amount was in excess of the amount of the original insurance.

§ 374. **The Massachusetts Non-Forfeiture Law.** — In many States laws exist, founded for the most part, if not altogether, upon what is known as the Massachusetts non-forfeiture law. In considering the law of Missouri on this subject and the construction to be given it the Supreme Court of that State, in holding that the requirements of the statute could not be waived, said:⁶ "Our law deems

¹ *Union Central L. Ins. Co. v. McHugh*, 7 Neb. 66; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410.

² *Farley v. Union Mut. L. Ins. Co.*, 41 Hun, 303; see also 9 N. Y. State Rep. 273.

³ *Nashville L. Ins. Co. v. Matthews*, 8 Lea, 499.

⁴ *Missouri Valley L. Ins. Co. v. Kelso*, 16 Kan. 481.

⁵ *Christy v. Homeopathic L. Ins. Co.*, 93 N. Y. 345. And see also *Hughes v. Piedmont & A. L. Ins. Co.*, 55 Ga. 111.

⁶ *Smith v. Mutual Ben. L. Ins. Co.*, 173 Mo. 329; 72 S. W. R. 935. See also *N. Y. L. Ins. Co. v. Cravens*, 178 U. S. 389; *Equitable L. A. Soc. v. Clements*, 140 U. S. 226.

the subject of life insurance one that requires special protection and in this particular it has provided that the policyholder shall have the benefit of the temporary insurances specified in Section 5856 '*anything in the policy to the contrary notwithstanding.*' Therefore though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply still they would apply. And if the parties could not in the beginning place themselves outside the policy of the law they could not by any amendment to it contract to do so. There is a great deal of technical learning in the subject of life insurance, and our law makers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of the subject to the experienced officers of the insurance company and for that reason have written into such contracts some provisions which the parties to them cannot avoid. We hold therefore that the provisions of our statute could no more have been avoided by the amendment to the policy in 1896 than by the original policy." This law,¹ which has with slight variations been adopted in

¹ St. 1861, Ch. 186. This law was changed in 1880; Laws 1880, Ch. 232, § 6. The original law of 1861 is re-enacted in Stat. 1882, § 159, Ch. 119, as follows:—

§ 159. No policy of life insurance issued between the ninth day of May in the year 1861 and the first day of January in the year 1881, by a domestic company shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the "combined experience" or "actuaries" rate of mortality, with interest at four per cent per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be canceled, four-fifths of what remains shall be considered as a net

many of the States, provides that no policy of life insurance shall be canceled or become void for non-payment of premium any further than the right of the assured to have it continued in force by the application of the net reserve on the policy, less any indebtedness to the company or notes given for premiums plus one-fifth of what is left after such deduction, to the purchase, as a single premium,¹ of paid-up insurance for the term which it will cover. If the death of the insured occurs during this term the amount of the policy is to be paid as if no default has been made, less, however, the amount of the premiums forborne with interest. It has been held in Massachusetts that this law only applies to domestic corporations;¹ and in Missouri that it does not apply to assessment companies.² Under this law a policy, terminable by failure "to pay when due any notes or other obligations given for premium," is determined by failure to pay an installment due on a premium note, and such note is to be deducted from the net value of the policy as an indebtedness³ and so with the unpaid half of an annual premium, payment of which was deferred six months by

single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid.

§ 160. If the death of such party occurs within the term of temporary insurance covered by the value of the policy as determined in the preceding section, and if no condition of the insurance other than the payment of premium is violated by the insured, the company shall pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; *provided*, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease, and that the company may deduct from the amount insured in the policy the amount at six per cent per annum of the premiums that had been forborne at the time of the death.

¹ *Haskell v. Equitable L. Ass. Soc.*, 181 Mass. 341; 63 N. E. R. 809.

² *Mutual Res. L. Ins. Co. v. Roth*, 59 C. C. A. 63; 122 Fed. R. 853.

³ *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500.

the terms of a memorandum.¹ But if the unpaid portion of the annual premium is not witnessed by a note or other memorandum it is not an indebtedness to be deducted from the net value of the policy as provided in the statute.² The Supreme Court of Louisiana, however, in a case against the same company, came to a conclusion just the reverse.³ Under the Missouri statute a loan is not an indebtedness to be deducted.⁴ So far as the application of the Massachusetts law to endowment policies is concerned, the Supreme Court of that State has held⁵ that the expiration of the time specified is equivalent to the death of the party, and if the insured has not paid the last annual premium, but has survived the term, the policy is payable less the amount of the last premium with interest. The point, made by the company, that the policy was only saved in case of the death of the insured within the life of the policy, under the law, after default in the payment of a premium, was not approved. Just before the expiration of the extension period the insured cannot secure further rights by paying the forborne premiums.⁶ Where the stipulations in a policy, in regard to commutation in case of non-payment of premiums, are more favorable to assured than the provisions of the statute, the latter has no application.⁷

¹ *Bigelow v. State Mut. L. Ass. Assn.*, 123 Mass. 113.

² *Goodwin v. Massachusetts Mut. L. Ins. Co.*, 73 N. Y. 480.

³ *Van Creelen v. Insurance Co.*, 35 La. Ann. 226.

⁴ *Smith v. Mut. Ben. L. Ins. Co.*, *supra*.

⁵ *Carter v. John Hancock Mut. Ins. Co.*, 127 Mass. 153.

⁶ *Omaha Natl. Bk. v. Mut. Ben. L. Ins. Co.*, 28 C. C. A. 300; 55 U. S. App. 73; 84 Fed. R. 122.

⁷ *Price v. Conn. Mut. L. Ins. Co.*, 48 M. A. 281. An important case where the rights under the statute were considered is *Nichols v. Mutual L. Ins. Co. of N. Y.*, 176 Mo. 355; 75 S. W. R. 664; 62 L. R. A. 657. Other Missouri cases are *Folkens v. N. W. Mut. A. Assn.*, 98 Mo. App. 480; 72 S. W. R. 720; *Cravens v. N. Y. L. Ins. Co.*, 148 Mo. 583; 53 L. R.

§ 375. **Stranger may become Liable for Premium.** — A stranger may become liable for the payment of premiums on a life insurance policy, as where a society, other than the insuring company, in consideration of weekly dues, promises certain benefits in sickness and to pay for life insurance.¹ So where a railroad company agrees to pay assessments or premium for an employee.² An assignee who holds a policy as a security for a debt is not bound to pay the annual premiums thereon,³ unless, of course, he expressly agrees to pay them. A liability to pay premiums may also arise by express contract, as under marriage settlement,⁴ or under a covenant in a mortgage.⁵

§ 376. **When Company Wrongfully Declares Forfeiture of the Policy.** — If a company wrongfully declares the policy forfeited and refuses to accept the premium

A. 305; 50 S. W. R. 519; *Raymond v. Ins. Co.*, 86 Mo. App. 391; *Horton v. N. Y. Life Ins. Co.*, 151 Mo. 604; 52 S. W. R. 356; *Epperson v. N. Y. Life Ins. Co.*, 90 Mo. App. 432. As to the non-forfeiture law of California see *Straube v. Pacific Mut. L. Ins. Co.*, 123 Cal. 677; 56 Pac. R. 546; *Nielsen v. Prov. Savings L. A. Soc.*, 139 Cal. 332; 73 Pac. R. 168. As to Maine law, *Ladd v. Union Mut. L. Ins. Co.*, 116 Fed. R. 878. As to method of computing the "net value," *Bankers L. Ins. Co. v. Fleetwood (Vt.)*, 57 Atl. R. 239; *Bankers L. Ins. Co. v. Howland*, 73 Vt. 1; 48 Atl. R. 435; 57 L. R. A. 374.

¹ *Teutonia L. Ins. Co. v. Anderson*, 78 Ill. 384. See also *Barker v. North British Ins. Co.*, 9 Scot. Ses. Cas. 869.

² *Lyon v. Travelers, etc., Co.*, 55 Mich. 141; *McMahon v. Travelers, etc., Co.*, 77 Ia. 229; *Bane v. Travelers, etc., Co.*, 85 Ky. 677; *Teutonia L. Assn. v. Muller*, 77 Ill. 22.

³ *Van Duursen v. Scanlan*, 7 Cin. L. Bul. 188.

⁴ *In re Miller*, 6 L. R. Ch. D. 790.

⁵ *In re Killan*, 15 L. R. (Irish) 388; *Deering v. Bank of Ireland*, 17 L. R. (Irish) 594. For questions as to damages for breach of contract to pay premiums, see *Dormay v. Borradalle*, 10 Beav. 335; *Bridge v. Deane*, 42 L. R. Ch. D. 9; *North British, etc., Co. v. Riky*, 2 Exc. 687; *Browne v. Price*, 4 C. B. (N. S.) 598; *Barber v. Butcher*, 15 L. J. (Q. B.) 289; *National L. Assn. v. Best*, 2 Hurlst. & N. 605; *Metcalf v. Hanson*, 35 L. J. (Q. B.) 225.

when duly tendered, and to give the insured the customary renewal receipt, evidencing the continued life of the policy, the assured has his choice of three courses: ¹ He may tender the premium and wait until the policy becomes payable by its terms and then try the question of forfeiture; ² or he may sue in equity to have the policy continued in force; ³ or he may elect to consider the policy at an end and bring an action to recover the just value of the policy, ⁴ in which case the measure of damages is the amount of the premiums paid with interest on each from the time it was made. ⁵ This measure of damages has however been doubted. ⁶ There is no implied promise in law to receive the premiums upon which an action can be based. ⁷ Tender is not

¹ See also as to Rescission, *ante*, § 277a.

² *Day v. Conn. General L. Ins. Co.*, 45 Conn. 480; *True v. Bankers L. Assn.*, 78 Wis. 287; 47 N. W. R. 520. See also *Langnecker v. Trustees*, etc., 111 Wis. 279; 87 N. W. R. 293; 55 L. R. A. 185.

³ *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Ins. Co. v. Tullidge*, 39 Ohio St. 240; *Hayner v. American Popular L. Ins. Co.*, 69 N. Y. 435; *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610.

⁴ *McKee v. Phoenix Mut. L. Ins. Co.*, 28 Mo. 383; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107; *Fisher v. Hope Mut. L. Ins. Co.*, 69 N. Y. 161.

⁵ *Ala. Gold. L. Ins. Co. v. Garmany*, 74 Ga. 51; *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143. See also generally, *Strauss v. Mut. R. F. L. Assn.*, 126 N. C. 971; 36 S. E. R. 352; 54 L. R. A. 605; *Ba we:l v. Ins. Co.*, 75 N. C. 8; *Gwaltney v. Provident, etc., Soc.*, 44 S. E. R. 659; 132 N. C. 925; *Bishop v. Life Ins. Co.*, 85 Mo. App. 302; *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 49; 49 N. E. R. 44; *McElwain v. Metropolitan L. Ins. Co.*, 50 App. Div. 63; 63 N. Y. Supp. 293; *N. Y. Life Ins. Co. v. Curry*, 24 Ky. L. R. 1930; 72 S. W. R. 736; 61 L. R. A. 268; *Makely v. Supreme Council, etc.*, 133 N. C. 367; 45 S. E. R. 649; *Puschman v. Ins. Co.*, 92 Mo. App. 640; *Fisher v. Metropolitan L. Ins. Co.*, 162 Mass. 236; 38 N. E. R. 503; *Barney v. Dudley*, 42 Kan. 112; 21 Pac. R. 1079.

⁶ *Ebert v. Mut. Res. F. L. Assn.*, 81 Minn. 116; 83 N. W. R. 506; 84 N. W. R. 457; *Williams v. Metropolitan L. Ins. Co.*, 54 N. Y. Supp. 595; 35 App. Div. 82.

⁷ *Day v. Conn. General L. Ins. Co.*, 45 Conn. 480. In the preceding sections of this chapter we have necessarily referred to many cases

necessary before action is brought to recover premiums paid.¹

§ 377. **Assessments in Benefit Societies Must be Made in Exact Accordance with their Laws: Strict Construction.** —In benefit societies the losses are paid from the proceeds of assessments, levied, as required, upon the members by a central or superior authority. The manner of calling these assessments is supposed to be set out in the constitution and by-laws, which also generally provide that if the member does not pay his assessments at the time prescribed, he forfeits all his rights as such member, or is suspended from those rights until such time as he shall be reinstated in accordance with the laws of the society. These provisions, being in the nature of penalties or forfeitures, are strictly construed as against the company, for, as says the Supreme Court of Michigan:² “It is well settled that no forfeiture can be established, except for a violation of the precise conditions laid down.” The member of a benefit society is as such subject to liabilities and entitled to privileges. His corporate rights may be subject to the control of the corporation, but his rights as a party insured rest on the contract, which is found in the constitution, rules and regulations of the order. The directors, or managers, or officers of such society, or order, have no right to make an assessment on a different basis than that prescribed in its

where, in consequence of what it has, or has not, done, the company has waived certain rights which it otherwise would have had in regard to the policy, or has become estopped from asserting them. While it would be sequential with what has preceded to consider specifically at this place the matters of waiver and estoppel, so far as premiums are concerned, it seems preferable to delay such consideration for the present so as to treat of waiver and estoppel in life insurance matters under the one title, see *post*, § 431, *et seq.*

¹ Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505; 58 S. W. R. 355.

² Bates v. Detroit Mut. Ben. Assn., 51 Mich. 587.

laws.¹ And the members of such society and their beneficiaries have the right to rely upon the observance by the company of the requirements of its constitution and by-laws.² The rules, in regard to assessments, were well stated by the Kentucky Court of Appeals in *Mut. Aid Society v. Helburn*,³ when it said: "Thus we see, that, in making assessments by the appellant upon its members, it does not act in a judicial, but in a ministerial, capacity. Therefore, no presumption can arise in favor of the regularity or legality of its assessments. That the appellant's board of directors, or an executive committee appointed by them, are the only persons authorized by appellant's charter to make assessments against its surviving members to pay the benefits due the representatives of its deceased members; that a deceased member of the society should have died, and that his representative was entitled to a benefit arising from his death; and that an assessment upon all of the surviving members was actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments,—are conditions precedent to the right of the appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessments until these things

¹ *Underwood v. Iowa Legion of Honor*, 66 Ia. 134; *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587; *Passenger Conductor's Assn. v. Birnbaum*, 116 Pa. St. 565; 11 Atl. Rep. 378. See also *Smith v. Covenant M. Ben. Assn.*, 16 Tex. Civ. App. 593; 43 S. W. R. 819; *Van Frank v. United States, etc., Assn.*, 158 Ill. 560; 41 N. E. R. 1005; *Wolf v. Michigan, etc., Assn.*, 108 Mich. 665; 66 N. W. R. 576; *Purdy v. Bankers L. Assn.*, 101 Mo. App. 91; 74 S. W. R. 486; *Garcelon v. Travelers', etc. (Mass.)*, 67 N. E. R. 868; *Polish, etc., Soc. v. Warczak*, 82 Ill. App. 351.

² *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Protection L. Ins. Co. v. Foote*, 79 Ill. 362; *Woodfin v. Ashville*, 6 Jones L. (N. C.), 568, and indeed all authorities cited in this and the subsequent sections of this chapter.

³ 85 Ky. 1; 2 S. W. Rep. 495. See also *Shea v. Mass. Ben. Assn.*, 160 Mass. 289; 35 N. E. R. 855.

occur, nor do they forfeit their membership by reason of their failure to pay such assessments, unless these things have occurred. And when the society relies upon the failure of any of its members to pay his assessment as a forfeiture of his membership, and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated; otherwise the member cannot be said to be in default.” In a case in Missouri,¹ where the assessment upon its members was required to be made by the subordinate lodge, the Court of Appeals held that the member was not obliged to pay any assessment levied by the grand lodge. And if the lodge is called upon to act it cannot be said to have done so if the presiding officer merely assumed that it would do so and did not put the question to vote.² The plain provisions of the charter in regard to the manner of levying assessments cannot be overlooked in search of some rule more equitable,³ and the assessment must be made by the officers or authority named in the charter or by-laws.⁴ If the assessment calls for the exercise of discretion on the part of the directors the power to make it cannot be delegated,⁵ and if the laws provide that an order for an assessment should be signed by certain officers, an unsigned order is invalid.⁶ But where the by-laws of a

¹ *Agnew v. A. O. U. W.*, 17 Mo. App. 254.

² *Bagley v. Grand Lodge A. O. U. W.*, 46 Ill. App. 411; affirmed 164 Ill. 340; 45 N. E. R. 538.

³ *Slater Mut. F. Ins. Co. v. Barstow*, 8 R. I. 343.

⁴ *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 586; *Agnew v. Ancient Order United Workmen*, 17 Mo. App. 254; *Susquehanna Mut. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424. See also *Chapple v. Sovereign Camp*, etc., 64 Neb. 55; 89 N. W. R. 423; *Grand Lodge v. Marshall*, 31 Ind. App. 534; 68 N. E. R. 605; *Earney v. Modern Workmen*, 79 Mo. App. 385; *Newton v. Northern*, etc., Assn., 21 R. I. 476; 44 Atl. R. 690.

⁵ *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *Garretson v. Equitable M. L. Assn.*, 93 Ia. 402; 61 N. W. R. 952. But see *Fee v. National M. Acc. Assn.*, 110 Ia. 271; 81 N. W. R. 483. See also *Ry. Passenger*, etc., Assn. *v. Robinson*, 147 Ill. 138; 35 N. E. R. 168.

⁶ *Baker v. Citizens' Mut. F. Ins. Co.*, 51 Mich. 243.

mutual assessment life insurance organization made it the duty of the directors to order an assessment upon the death of a member, and empowered the chairman to approve proofs of death, and at a meeting of the directors notice of a death was received, but not the proofs, and the directors instructed the chairman to examine the proofs when they should arrive, and instructed the secretary, if the proofs were found correct, to issue notice of an assessment, and thereafter the proofs were examined by the chairman and approved by him, and the assessment was made in good faith accordingly, and was just and proper; it was held that such an assessment was legal and was not open to the objection that it was made by the chairman and not by the directors.¹ If the laws provide that the directors shall fix the amount, they cannot order that a sum "not exceeding" a certain amount be called, the exact sum must be stated.² An assessment cannot be made for anticipated losses, the laws of the society making no provision for such a call,³ but they may exercise a reasonable discretion and make allowance for expenses and those who will not pay.⁴ The statement of an assessment need not descend into minute detail, but must show with sufficient clearness all facts to enable the member to see the necessity for the call.⁵ Where the laws of a mutual company provided that the membership should be assessed by classes, an assessment ignoring the classes was held invalid.⁶ In general an assessment will not be binding unless it appears that it was made

¹ *Passenger Conductors, etc., Ins. Co. v. Birnbaum*, 116 Pa. St. 565; 11 Atl. Rep. 378. *Mee v. Bankers L. Assn.*, 69 Minn. 210; 72 N. W. R. 74.

² *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504.

³ *Rosenberger v. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207; *Crossman v. Mass. Mut. Ben. Assn.*, 143 Mass. 435.

⁴ *Idem. Susquehanna Mut. F. Ins. Co. v. Gackenback*, 19 W. N. C. 287.

⁵ *Lycoming Ins. Co. v. Bixby*, 15 W. N. C. 109.

⁶ *Atlantic, etc., Ins. Co. v. Moody*, 74 Me. 385.

when the person assessed was a member; that the losses for which it was made accrued while he was a member, that it was made as prescribed by the laws of the company.¹ An assessment is valid although levied at a meeting of the corporation held without the State;² so is one for a reserve fund.³ If an assessment be not levied according to the constitution and by-laws, it is illegal, the member is under no obligation to pay it and his rights are not affected by its non-payment.⁴ The fact that the assessment is made in accordance with the custom of the order is immaterial, unless it be shown that the member had notice of such custom.⁵ An assessment can be made by the directors after the company has made a general assignment for the benefit of creditors.⁶ The superior governing body of a benefit society incorporated under the laws of the State where it does business, cannot compel its members to pay assessments levied by order of a supreme lodge incorporated under the laws of another State. A case involving this question was decided by the Supreme Court of Michigan,⁷ which thus stated the facts and its opinion: "This is an application for a *mandamus* to compel the recognition of relator as a member of one of the subordinate lodges of the order of which respondent is the supreme governing authority in this State. As such member he stands insured by the respondent in the sum of \$2,000 payable on

¹ *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33.

² *Derry Council v. State Council, etc.*, 197 Pa. St. 413; 47 Atl. R. 28.

³ *Fullenwider v. Sup. Cl. R. L.*, 180 Ill. 621; 54 N. E. R. 485; affg. 73 Ill. App. 321.

⁴ *Underwood v. Iowa Legion of Honor*, 66 Ia. 134; *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Conductors' Assn. v. Birnbaum*, 116 Pa. St. 565; 11 Atl. Rep. 378; *American Mut. Aid Soc. v. Helburn*, 81 Ky. 1; 8 Ky. L. Rep. 627; 2 S. W. Rep. 495.

⁵ *Underwood v. Iowa Legion of Honor*, *supra*.

⁶ *Schimpf v. Lehigh Valley, etc., Ins. Co.*, 86 Pa. St. 373.

⁷ *Lamphere v. Grand Lodge A. O. U. W.*, 47 Mich. 429.

his death, or on his surviving for a specified term of years. He stands suspended by the respondent, and thereby loses his insurance, for refusing to recognize and pay an assessment made under the orders of the supreme lodge of the order, which is a corporation existing under the laws of Kentucky, and not subject to this jurisdiction. The assessment was made to pay losses on risks taken by the order in other States and by other State grand lodges. The respondent is a Michigan corporation, existing under chapter 94 of the Compiled Laws of 1871. The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the State permitting it, nor could there be any law of the State which would subject a corporation created and existing under the laws of this State to the jurisdiction and control of a body existing in another State, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being. A *mandamus* will therefore issue as prayed.”¹ The express or implied assent of the member to an authority not within the scope of the charter, does not confer such authority nor estop such member from denying it.² Where the members are free under the society’s laws to pay the assessments or not, the company cannot compel payment nor can the court make an assessment for unpaid losses in proceedings to wind up the company.³ Nor can the court assess where authority is conferred only upon the directors.⁴ The question always is whether in the contract

¹ See also *Grand Lodge v. Stepp*, 3 Penny, 45; *In re Grand Lodge A. O. U. W.*, 110 Pa. St. 613; 1 Atl. R. 582.

² *Grand Lodge, etc. v. Stepp*, *supra*.

³ *In re Protection L. Ins. Co.*, 9 Biss. 188. But see *Ellerbe v. Barney*, 119 Mo. 632; 25 S. W. R. 384; and *Burden v. Mass., etc., Assn.*, 147 Mass. 360; 17 N. E. R. 874. See also following section.

⁴ *Hill v. Merchants, etc., Ins. Co.*, 28 Grant. Ch. Up. Can. 560; Duff 944

the assured promised to pay the assessments, or whether the payment was only a condition, the performance of which was optional. Where the lodge is required to make the assessment the fact that it did so may be shown by parol,¹ and the notice by the supreme secretary is *prim facie* proof of the necessity for an assessment.² The validity of an assessment is not affected where the loss on which it was made is paid out of the reserve fund,³ and where the by-laws provide that a certain sum should be paid at specific periods to meet death losses, it is due though no deaths have occurred.⁴ A society cannot assess to create a reserve fund unless the right is clearly given in the charter.⁵ The making of an assessment is not a matter of pure discretion if the legal right to have it made exists.⁶ The assessment may include interest and costs of a judgment obtained against the association, and the amounts paid on an illegal assessment may be reassessed and the members who had paid the former credited on the latter with such amount.⁷

v. Canadian, etc., Ins. Co., 6 Ont. App. 238. But see *McDonald v. Ross-Lewin*, 29 Hun, 87.

¹ *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61; 48 N. W. R. 454.

² *Demings v. Supreme Lodge, etc.*, 131 N. Y. 522; 30 N. E. R. 572; reversing 14 N. Y. Supp. 834. See also *Bridges v. National Union*, 73 Minn. 486; 76 S. W. 270; *Order Chosen Friends v. Austerlitz*, 75 Ill. App. 74.

³ *McGowan v. Supreme Council, etc.*, 28 N. Y. Supp. 177.

⁴ *Menard v. Society*, 63 Conn. 172; 27 Atl. R. 1115. See also *Morton v. Royal Tribe, etc.*, 93 Mo. App. 78. As to compulsory table of rates fixed by statute, *State v. Fraternal, etc.* (Wash.), 77 Pac. R. 500.

⁵ *Hogan v. Pacific End. L.*, 99 Cal. 248; 33 Pac. R. 924.

⁶ *Ry. Passenger, etc., Assn. v. Robinson*, 147 Ill. 138; 35 N. E. R. 168; affirming 38 Ill. App. 111; *Dillingham v. Cotton Exchange*, 49 Fed. 719.

⁷ *Ionia, etc., Co. v. Ionia Circuit Judge*, 100 Mich. 606; 59 N. W. R. 250. As to assessments made by assessment companies, *Covenant M. L. Assn. v. Tuttle*, 89 Ill. App. 309; *Ebert v. Mut. Reserve F. L. Assn.*, 81 Minn. 116; 83 N. W. R. 506; 84 N. W. R. 457; *Strauss v. Mut. Res., etc.*,

A member of an association is not estopped to question the validity of an assessment.¹

§ 378. **Who Liable for Assessments.**—Members of benefit associations are under no obligation to pay assessments levied for deaths which occurred prior to the time when they became such, nor for those called to pay deaths occurring after the membership had ceased; but generally, and unless the laws provide otherwise, the issuance and acceptance of the certificate furnishes sufficient consideration for the member's agreement to pay any assessment made during the time he should continue a member, and upon his failure an action will lie against him therefor, though of course if by the laws of the society payment of an assessment is optional with the member, no action will lie.² The

Assn., 126 N. C. 971; 36 S. E. R. 352; 54 L. R. A. 605; *Sowles v. Mut. R. F. L. A.*, 71 Vt. 466; 45 Atl. R. 1045; *Mut. R. F.*, etc., *Assn. v. Taylor*, 93 Va. 208; 37 S. E. R. 854; *Gaut v. Mut. R. F. L. A.*, 121 Fed. R. 403; *Haydell v. Mut. R. F. L. A.*, 44 C. C. A. 169; 104 Fed. R. 718; *Crosby v. Mut. R. F. L. A.*, 38 Misc. 708; 78 N. Y. Supp. 237; *Barbot v. Mut. R. F. L.*, etc., 100 Ga. 68; 28 S. E. R. 498; *Anderson v. Mut. R. F. L. A.*, 171 Ill. 40; 49 N. E. R. 205; affg. 71 Ill. App. 269; *Smith v. Covenant M. L. Assn.*, 16 Tex. Civ. A. 593; 43 S. W. R. 819; *Hartford L. Ins. Co. v. Hyde*, 101 Tenn. 396; 48 S. W. R. 968.

¹ *Rowell v. Covenant, etc., Assn.*, 84 Ill. App. 304.

² *McDonald v. Ross-Lewin*, 29 Hun, 87; *Ellerbe v. Barney*, 119 Mo. 632; 25 S. W. R. 384; *Smith v. Brown*, 75 Hun, 231; 27 N. Y. Supp. 11; *In re Eq. Reserve F. Assn.*, 61 Hun, 299; 16 N. Y. Supp. 80. The cases, *State v. Monitor Fire Assn.*, 42 Ohio St. 555; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Farmers', etc., Ins. Co. v. Chase*, 56 N. H. 341; *Stewart v. Northampton, etc., Ins. Co.*, 38 N. J. L. 436; *Tolford v. Church*, 66 Mich. 431; 33 N. W. Rep. 913; *Planters' Ins. Co. v. Comfort*, 50 Miss. 661, relate to the assessments of mutual fire insurance organizations. In *Farmer v. State*, 69 Tex. 561, the court assumes that payment of assessments is optional with the member and no action will lie therefor, as also in *Chicago M. L. Ind. Assn. v. Hunt*, 127 Ill. 257. In *re Protection L. Ins. Co.*, 9 Biss. 188, the question was squarely decided that payment of assessments was not compulsory and in *Burdon v. Mass. Safety Fund Assn.*, 147 Mass. 360, the court was inclined to follow this ruling. *Rood v. Railway Passenger, etc., Assn.*

question is one of construction of the language of the individual contract and necessarily no general rule can be laid down that will apply to all cases. The weight of authority seems to be in favor of the rule that the contract is unilateral and the member is under no obligation to pay an assessment.¹ Failure to pay an assessment, levied on a member for a death which occurred prior to the date of his certificate, the assessment being in violation of the laws of the society, will not invalidate the claim of his representatives to benefits.² Where the by-laws of a benefit society provided that proofs of death should be made in a specified manner and laid before the directors, and if so decided an assessment should be made upon each member of the class to which the deceased belonged, it was held³ that the assessment could be made only on those who were members of the class subject thereto at the time the resolution was adopted. Members are liable for assessments to pay losses which occurred during the time they were such, although the insolvency of the company has been decreed.⁴ For-

31 Fed. R. 62, also tends to support this view. In *McDonald v. Ross-Lewin*, 29 Hun, 87, and *Smith v. Brown*, 75 Hun, 231, the contrary doctrine was laid down as was also in *Ellerbe v. Barney*, 25 S. W. R. 384; 23 L. R. A. 435; 119 Mo. 632. In this latter case three judges dissented in a strong opinion. See also *New Era L. Assn. v. Rensiter*, 132 Pa. St. 314; *Vanatta v. N. I. M. L. Ins. Co.*, 31 N. J. Eq. 15; *Akers, Receiver v. Hite*, 94 Pa. St. 349; *Caikins v. Angell*, 123 Mich. 77; 81 N. W. R. 977; *Provident M. R. Assn. v. Pelissier*, 69 N. H. 606; 45 Atl. R. 562; *Fulton v. Stevens*, 99 Wis. 307; 74 N. W. R. 803; *Smith v. Brown*, 75 Hun, 231; 27 N. Y. Supp. 11; all of which are cases where the contract was clear that the assured agreed to pay all assessments that might be called.

¹ *Gibson v. McGrew*, 154 Ind. 273; 56 N. E. R. 674; 48 L. R. A. 362; *Lehman v. Clark*, 174 Ill. 279; 51 N. E. R. 222; 43 L. R. A. 648; *reversg.* 71 Ill. App. 366; *L. Union v. Ostigny*, 25 R. I. 478; 56 Atl. R. 681.

² *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

³ *Miller v. Georgia Masonic Mut. Life Ins. Co.*, 57 Ga. 221.

⁴ *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. Eq. 15; *Commonwealth v. Mass. Mut. Fire Ins. Co.*, 112 Mass. 116; 119 Mass. 45. But see *Union Mut. F. Ins. Co. v. Spaulding*, 61 Mich. 77; 27 N. W. Rep. 860, where

feiture cannot be declared for non-payment of an assessment if at the time it was made the society had enough to pay the death on which such assessment was levied.¹

§ 379. **Notice of Assessments.** — Unless the laws of the society or company expressly provide otherwise, there is no liability on the part of a member to pay an assessment until notice thereof has been given in the manner provided in the constitution or by-laws. And where the association claims a forfeiture for non-payment of an assessment, it must show that the member was notified in the manner prescribed by the by-laws.² The company may, however, adopt a different method than that prescribed in the by-laws, as by custom, and thereby become estopped.³ Whether notice was given or not is a question of fact.⁴

it was held that, after a member has withdrawn from the association, he is not liable for assessments made thereafter on a claim which existed before such withdrawal, but was not discovered until afterwards.

¹ *Knight v. Supreme C. O. C. F.*, 6 N. Y. Supp. 427.

² *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Payne v. Mut. Relief Soc.*, 17 Abb. N. C. 53; *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 298; *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. C. 41; *Scheufler v. Grand Lodge A. O. U. W.*, 45 Minn. 256; 47 N. W. R. 799; *Ball v. N. W. Mut. Acc. Assn.*, 56 Minn. 414; 57 N. W. R. 1063; *Mut. Reserve, etc. v. Hamlin*, 139 U. S. 297; 11 S. C. R. 614; *Garrettson v. Mutual, etc., Assn.*, 93 Ia. 402; 61 N. W. R. 952; *Masi v. Congrega., etc.*, 17 Misc. 609; 40 N. Y. Supp. 667; *Murphy v. Independent Order, etc.*, 77 Miss. 830; 50 L. R. A. 111; 27 Sou. R. 624; *Shafer v. United, etc., Soc.*, 22 Misc. 363; 49 N. Y. Supp. 151; *Doggett v. United Order, etc.*, 126 N. C. 477; 36 S. E. R. 26. See for examples of insufficient notice: *Ball v. N. W. Mut. Acc. Assn.*, 56 Minn. 414; 57 N. W. R. 1063; *Moore v. Order Ry. Conductors*, 90 Ia. 721; 57 N. W. R. 623; *Warner v. Natl. L. Assn.*, 100 Mich. 157; 58 N. W. R. 667; *N. W. Traveling Men's Assn. v. Schauss*, 35 N. E. R. 747; 148 Ill. 304; *Newton v. S. W., etc., Assn.*, 116 Ia. 311; 90 N. W. R. 73; *Wolf v. Michigan, etc., Assn.*, 108 Mich. 665; 66 N. W. R. 576.

³ *Gunter v. N. O. Cotton Exchange Assn.*, 40 La. Ann. 776; 5 South. R. 65.

⁴ *Jackson v. Northwestern, etc., Soc.*, 78 Wis. 463; 47 N. W. R. 733.

If, under the laws of the society which is composed of a supreme and subordinate lodges the latter are to pay assessments upon notice from the former, no liability is imposed upon the subordinate lodge or its members, until due notice in conformity with the laws of the order is given, and good standing is not lost by a failure to pay an assessment of which no notice is given.¹ And no obligation rests upon the members of the subordinate lodge to pay an assessment until they in turn are notified of it in conformity with the laws of the order.² The Court of Appeals of Missouri thus states the law in regard to notice of assessments in these associations:³ “ There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon inquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by notice given in any other form or manner. Thus, when a man’s rights are to be adjudicated in a court of justice, he is entitled to just the form, manner and time of notice that are directed by the statute; otherwise he will not be bound by the proceedings, although bodily present in the court room, seeing and hearing all that may be done. The indorser of a promissory note may have a personal knowledge of the maker’s intention not to pay, or of his failure to pay, at

¹ *Hall v. Supreme Lodge K. of H.*, 24 Fed. Rep. 450.

² *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Coyle v. Kentucky Grangers’ Mut. Ben. Assn. (Ky.)*, 2 S. W. Rep. 676; *Seibert v. Chosen Friends*, 23 Mo. App. 268.

³ *Siebert v. Chosen Friends*, 23 Mo. App. 272. But see *Thibert v. Supreme Lodge K. of H.*, 78 Minn. 448; 81 N. W. R. 220; 47 L. R. A. 136. As to custom of sending notices *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; 73 Pac. R. 740; *Denver L. Ins. Co. v. Crane (Colo.)*, 73 Pac. 875.

maturity. Yet the holder cannot subject him to any liability, without a notice of the dishonor, given in the form, time and manner, established by commercial law and usage. Mrs. Siebert might have heard a rumor, or have been informed by a friend, that assessment number 72 had been declared, and must be paid by a certain time. But she had a right to disbelieve the rumor, or the friend, until a knowledge of the fact was brought home to her in the way for which she had stipulated in her contract with the association. That contract was visible in the printed laws of the association, and in her acceptance of them in her application for membership." In a somewhat similar case the Supreme Court of Illinois said: ¹ "It was competent for the contracting parties to fix their own terms in this respect, and having fixed them, they must abide by them. Thirty days after the date of the notice, but not until then, the parties have contracted, if the money is not paid, the certificate shall be void. There was, therefore, no obligation to make a tender, in the absence of a notice, for the purpose of preventing a forfeiture." But if the by-laws provide for payment of assessments at fixed times without notice the member is entitled to none. In a case where this question was involved,² the court said: "The regular assessments levied by the defendant order to pay death losses are classified according to the age of the members. They are monthly, and payable on or before the 28th day of each month. They are as regular as clockwork; are certain as to amount and time of payment; hence no special notice of their levy or of the amount or time of payment was necessary. A member holding a beneficiary certificate of the order receives this notice once for all when he receives the certificate, which, in effect, incorporates this law of the

¹ *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 467.

² *Lavin v. Grand Lodge, etc.* (Mo. App.), 78 S. W. R. 325.

order into the contract of insurance; and a member, by accepting the certificate, agrees to pay the monthly assessments as required by law 196, as a condition precedent to the continuance of his certificate in force. That it is competent for a beneficiary association and a member thereof, to so agree, it seems to us, admits of no doubt, and that such an agreement is just and fair to all the members of the order holding insurance certificates is self-evident.” In an action on a certificate issued by a mutual life insurance company, conditioned that failure to pay assessments thirty days after notice should avoid the same, it appeared that two other members of the family of the assured were holders of certificates in the same company, and that three notices of the assessment inclosed in one envelope were received by one of them. It was held¹ that a finding that notice was not mailed to the insured would not be disturbed, such mailing being proved only by the general course of business of the company. Mortality assessments are not premiums within the meaning of the New York statute requiring notice before forfeiture,² because they are uncertain in amount and time of payment and are only payable on notice and demand.

§ 380. **The Same Subject: Contents of Notice.** — The contents of the notice and its form should conform to the requirements of the by-laws or constitution of the society. If official stamp of the collector is required its omission will vitiate the notice.³ Thus, where the by-laws required a notice of an assessment to be given to

¹ *Garretson v. Equitable, etc., Assn.*, 74 Ia. 419; 38 N. W. Rep. 127. See also *Gabbutt v. Citizens, etc., Assn.*, 84 Ia. 293; 51 N. W. R. 148; *Drum v. Benton*, 13 App. D. C. 245.

² *Merriam v. Keystone, etc., Assn.*, 138 N. Y. 116; 33 N. E. R. 738.

³ *Cronin v. Supreme Council, etc.*, 199 Ill. 228; 65 N. E. R. 323; reversing 101 Ill. App. 479.

the members, which should include a list of deaths since the last assessment notice and notify them of the amount due to the benefit fund, a notice which did not do this was held void.¹ In this case the Supreme Court of Michigan said: "The defendant company was insisting on a forfeiture. The entire defense rested upon it to defeat the plaintiff's claim. Forfeitures of policies of insurance are not to be favored. The beneficiaries under them are, perhaps, we may safely say, in two-thirds of the cases, persons not learned in the technicalities of the language in which they are not unfrequently couched; and in construing them courts will, whenever a forfeiture is claimed, preserve, if possible, the equitable right of the holder. The two things omitted in this notice mailed, were to be notified to Mr. Miner; and the time for making payment, which gave the right to the forfeiture claimed, did not begin to run until the proper notice was given as required by the by-law quoted. And there was something of substance in the part omitted from the notice. In case of the absence or loss of his certificate the notice would furnish him with the only information of the amount he was called upon to pay; and the member was entitled to know the number of deaths since the last assessment, for by this information alone could he form any opinion as to the honest administration of the company's affairs, or as to the care exercised in the selection of lives and members."² Want of a seal on the notice will not invalidate it,³ and a

¹ *Miner v. Mich. Mut. Ben. Assn.*, 63 Mich. 338; 29 N. W. Rep. 852. See *Grand Lodge v. Marshall*, 31 Ind. App. 534; 68 N. E. R. 605.

² *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587; 17 N. W. Rep. 67; *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110; *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Maginnis v. N. O. Cotton Exch., etc.*, 43 La. Ann. 1136; 10 South. R. 180; *Dowling v. Knights L., etc., Co.*, 116 Mich. 471; 74 N. W. R. 725; *Miller v. U. S. G and Lodge, etc.*, 72 Mo. App. 499; *Supreme Council, etc. v. Winter*, 108 Ky. 141; 55 S. W. R. 908.

³ *Karcher v. Supreme Lodge, etc.*, 137 Mass. 368; *Heffernan v. Supreme Council. A. L. H.*, 40 M. A. 605.

notice is good if under seal of the lodge though unsigned; ¹ a member is not entitled to notice of the suspension of the lodge unless the by-laws so provide.² The requirements of the by-laws relative to the form and contents of the notice may be waived by the member as by paying assessments under an informal notice; ³ an application for reinstatement is a waiver of any defects in the notice of the assessments under which the member was suspended.⁴ Refusal to pay on grounds other than want of notice is a circumstance to show notice.⁵ A notice requiring payment in thirty days when the by-laws allowed forty, was held a nullity,⁶ and so with a twenty-eight day notice the by-laws requiring thirty.⁷ Where the notice is required to be given by a certain person, as by the general secretary, the notice must be signed by him but may be mailed by one subordinate, as the local secretary.⁸

§ 381. **The Same Subject: Service of Notice.**—Notice may be given in any way the by-laws may prescribe, for the parties may agree what shall or shall not be notice. And they may agree that assessments shall be paid without notice.⁹ If the by-laws provide that notice may be given by

¹ *Hansen v. Supreme Lodge K. of H.*, 140 Ill. 301; 29 N. E. R. 1121.

² *Peet v. Great Camp T. O. T. M.*, 83 Mich. 92; 47 N. W. R. 119.

³ *Stewart v. Supreme Council A. L. H.*, 36 M. A. 319; *Heffernan v. Sup. Council A. L. H.*, 40 M. A. 605. See also *Ry. Passengers, etc. v. Leonard*, 82 Ill. App. 214; *Supreme Council, etc. v. Winter*, 108 Ky. 141; 55 S. W. R. 908.

⁴ *Hansen v. Supreme Lodge K. of H.*, 140 Ill. 301; 29 N. E. R. 1121; *Grand Lodge A. O. U. W. v. Cressey*, 47 Ill. App. 616.

⁵ *Hollister v. Quincy Ins. Co.*, 118 Mass. 478.

⁶ *Haskins v. Kentucky Grangers' Mut. Ben. Soc.*, 7 Ky. L. Rep. 371; *Frey v. Wellington Mut. Ins. Co.*, 4 Ont. App. 293.

⁷ *United States Mut. Acc. Assn. v. Mueller*, 151 Ill. 254; 37 N. E. R. 882.

⁸ *Payne v. Mut. Relief Soc.*, 6 N. Y. S. Rep. 365; 17 Abb. N. C. 53.

⁹ *Levin v. Grand Lodge, etc. (Mo. App.)*, 78 S. W. R. 325.

mail it is sufficient to prove the mailing; and the failure of the notice to reach the assured, by reasons of its miscarriage in the mail, or the absence of the assured, will not excuse the non-payment of the assessment within the prescribed time.¹ It must however be mailed to the correct address.² Notice to the husband is not notice to the wife though both be members.³ It is competent for the parties to agree what shall be notice and it is enough to conform to the agreement as contained in the by-laws, as for example, that publication in a newspaper shall be notice.⁴ Where the charter provided that the members should be *notified* of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit their rights, it was held that such personal liability could not attach by merely mailing the notice if it was not in fact received.⁵ In this case⁶ the court says: "As to the second point, was the fact of mailing the paper which contained the information for the member sufficient of itself to constitute the notification required by the charter? The proposition here is that it makes no

¹ *Greeley v. Iowa State Ins. Co.*, 50 Ia. 86; *Yoe v. B. C. Howard M. A. Assn.*, 63 Md. 86; *Weakly v. Northwestern B. & M. A. Assn.*, 19 Bradw. 327; *Borgrafe v. Supreme Lodge K. & L. of H.*, 22 Mo. App. 127; *Epstein v. Mut. Aid, etc., Assn.*, 28 La. Ann. 938; *Union Mut. Acc. Assn. v. Miller*, 26 Ill. App. 230; *Forse v. Supreme Lodge K. of H.*, 41 M. A. 106; *Jones v. Sisson*, 6 Gray, 288; *York Co. Ins. Co. v. Knight*, 48 Me. 75; *Atl. F. Ins. Co. v. Sanders*, 36 N. H. 252; *Modern Woodmen v. Tevis*, 54 C. C. A. 293; 117 Fed. R. 369; *Hannum v. Waddill*, 135 Mo. 153; 36 S. W. R. 616.

² *Molloy v. Supreme Council, etc.*, 93 Ia. 504; 61 N. W. R. 928; *Waterworth v. Am. Order, etc.*, 164 Mass. 574; 42 N. E. R. 106.

³ *Gabbutt v. Citizens, etc., Assn.*, 84 Ia. 293; 51 N. W. R. 148. See also *Garretson v. Equitable, etc., Assn.*, 74 Ia. 419.

⁴ *Northampton, etc., Ins. Co. v. Stewart*, 39 N. J. L. 486; *Epstein v. Mut. Aid, etc., Assn.*, 28 La. Ann. 938. In case of advertising the time runs from date of last publication.

⁵ *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273; *People v. Hoboken Club*, 14 N. Y. Supp. 76. See also *Crockett v. Order, etc.*, 24 Ohio Cir. Ct. 421.

⁶ *Castner v. Farmers' M. F. Ins. Co.*, *supra*.

difference whether the member ever gets knowledge of the assessment upon him or not, provided notice of it is regularly mailed to him, and therefore the contention is to be viewed on the assumption that he does not get it. The language of the charter is that the member is to be '*notified*' by the secretary or otherwise, either by *circular* or a verbal *notice*.' The consequences to flow from this notification are admitted to be important. A fixed personal liability is to depend upon it; and further, in case of failure to respond by payment of the sum assessed as communicated by the '*notice*,' during a given number of days, the member is to stand unprotected by his policy and wholly without remedy or redress in case of loss. In principle it is not easy to distinguish the nature of the required notification from the office and object of service of process, and here would seem to be as much reason for real notice in the case in question as in the case of an action. The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the person insured, eventuate in wide-spread loss and injustice. No construction, open to so much objection, should be admitted unless rendered necessary by the terms of the charter; and they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed, or sent or forwarded. The members are to be '*notified*,'—that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members or by delivery to them of written statements through the agency of the post-office or some other.' Mailing the notice is sufficient if it was in fact received.¹ Where the assessment was payable thirty

¹ *Benedict v. Grand Lodge A. O. U. W.*, 48 Minn. 471; 51 N. W. R. 371. See, as to proof of mailing, *Ry. Passenger, etc., Assn. v. Leonard*,

days after notice and no notice was received, no forfeiture will result in the absence of an express provision to that effect;¹ and if the assessment be payable a specified length of time after notice such notice must be actual and it is not enough that the notice was taken from the post-office by an unauthorized person and was in fact never seen by the assured, he being too sick at the time to understand any business and the envelope being unopened;² and especially if the assessment is payable a certain length of time after reception of notice.³ If the laws of the society provide that the member shall be notified of assessments, but does not state how he shall be notified, the notice must be personal and actual.⁴ Where no method of notice is prescribed it is sufficient to give actual notice and personal notice is a publication within the meaning of that term used in the by-laws.⁵ A provision in the laws of a benefit association that notice of an assessment should be mailed by the financier of the subordinate lodge not later than the eighth of the month has been held to be directory only and not essential.⁶ If a letter be mailed the presumption is that it was received.⁷

82 Ill. App. 214; *National Union v. Shipley*, 92 Ill. App. 355; *Hunter v. National Union*, 197 Ill. 478; 64 N. E. R. 356; *Mills v. Home Ben. Assn.*, 105 Cal. 232; 38 Pac. R. 723.

¹ *Merriman v. Keystone, etc., Assn.*, 138 N. Y. 116; 33 N. E. R. 738; *affg.* 18 N. Y. Supp. 305.

² *Courtney v. U. S. Masonic, etc., Assn. (Ia.)*, 53 N. W. R. 238.

³ *Schmidt v. German, etc., Ins. Co. (Ind.)*, 30 N. E. R. 938.

⁴ *Wachtel v. Noah Widows and Orphans' Soc.*, 84 N. Y. 28; *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Castner v. Farmers' Mut. F. Ins. Co.*, *supra*; *Borgraefe v. Supreme Lodge Knights and Ladies of Honor*, 22 Mo. App. 127; *Fields v. United Brotherhood, etc.*, 60 Ill. App. 258.

⁵ *Jones v. Sisson*, 6 Gray, 288. As to statutory notice, *Shrimpton v. Farmers', etc., (Ia.)*, 98 N. W. R. 613; *French v. Hartford L., etc.*, 169 Mass. 510; 48 N. E. R. 268; *Bridges v. National Union*, 73 Minn. 486; 76 N. W. R. 270; *Smith v. Covenant, etc., Assn.*, 16 Tex. Civ. A. 593; 43 S. W. R. 819.

⁶ *Benedict v. Grand Lodge A. O. U. W.*, 48 Minn. 471; 51 N. W. R. 371.

⁷ *Benedict v. Grand Lodge, etc., supra*; *Rosenthal v. Walker*, 111 U. S. 185; *Briggs v. Hervey*, 130 Mass. 186; *Russell v. Buckley*, 4 R. I. 525.

Where the officers of an association agreed to send a notice to a third person in behalf of an insane member such agreement must be complied with.¹

§ 382. **From what time the Period Allowed for the Payment of Assessments Dates.** — Where the laws of the society require that the assessments shall be paid within a certain number of days “from the date of the notice” thereof, the date will be construed to mean the day it is delivered or received, and not the date written in the notice or the day it is mailed, and in computing the number of days the day on which the notice is received will be excluded.² But, by agreement of the parties, the period may run from the time of mailing the notice.³ Where notice was required to be given “at once,” but the secretary did not send it until thirteen days had elapsed, such notice requiring payment to be made within thirty days from its date and the member died thirty-four days after the date of the notice, it was held that no forfeiture resulted.⁴ Where, by the terms of the contract, the assured agreed to pay to the association an assessment upon the death of any member, “within thirty

¹ *Buchanan v. Supreme Conclave, etc.*, 178 Pa. St. 465; 35 Atl. R. 873; 34 L. R. A. 436. See also *Woodmen, etc. v. Gilliland (Okla.)*, 67 Pac. R. 485.

² *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88; *National Mut. Ben. Assn. v. Miller*, 85 Ky. 88; 2 S. W. Rep. 900; *Wetmore v. Mut. Aid, etc. Assn.*, 23 La. Ann. 770; *United States Mut. Acc. Assn. v. Mueller*, 151 Ill. 254; 37 N. E. R. 882; *N. W., etc., Assn. v. Schauss*, 148 Ill. 304; 35 N. E. R. 747; *Great Western, etc., Assn. v. Colmar*, 7 Colo. App. 275; 43 Pac. R. 159; *Ferrenbach v. Mutual R. L. Assn.*, 59 C. C. A. 307; 121 Fed. R. 945; *Sup. Council, etc. v. Gootee*, 32 C. C. A. 436; 61 U. S. App. 617; 89 Fed. R. 941; *Shelden v. National Mas. Acc. Assn.*, 122 Mich. 403; 81 N. W. R. 266; *Cronin v. Supreme Council, etc.*, 199 Ill. 228; 65 N. E. R. 323.

³ *Ross v. Hawkeye Ins. Co.*, 83 Ia. 586; 50 N. W. R. 47; *Hicks v. National L. Ins. Co.*, 9 C. C. A. 215; 60 Fed. R. 690; *Survick v. Va. ley M. L. I. Co. (Va.)*, 23 S. E. R. 323.

⁴ *Knight v. Sup. Council. O. C. F.*, 6 N. Y. Supp. 427.

days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans, in English, German, and one in French for five consecutive days," it was held that under this clause the assured was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication, within which to pay an assessment.¹ But the laws of the society may provide otherwise, in which case the agreement of the parties determines the question.² The member has until midnight of the day on which the assesment is due to pay it.³ The member may waive the manner of giving the notice of an assessment as by corresponding with the company about paying it,⁴ or by a custom of paying assessments on informal notice.⁵

§ 383. **Manner of Paying Assessment.**—Unless the constitution and by-laws require the payment of the assessment in money there is no reason why the same rule should not apply as in the case of life insurance companies and payment be made by note, check, money order or anything that may be accepted by the agent as money;⁶ such as an agreement to pay in printing;⁷ or a check which was mailed in accordance with a former practice;⁸

¹ *Wetmore v. Mutual Aid, etc., Assn., supra.*

² *Weakly v. Northwestern Ben. & Mut. Aid Assn.,* 19 Bradw. 327; *Benedict v. Grand Lodge A. O. U. W.,* 48 Minn. 471; 51 N. W. R. 371.

³ *Ochs v. Homestead Ins. Co.,* 4 Pittsburg L. J. 98.

⁴ *Hollister v. Quincy Ins. Co.,* 118 Mass. 478.

⁵ *Stewart v. Sup. Counc. A. L. H.,* 36 Mo. App. 319; *Heffernan v. Same,* 40 M. A. 605.

⁶ *Kline v. National Ben. Assn.,* 111 Ind. 462; 11 N. East Rep. 620; *Protection L. Ins. Co. v. Foote,* 79 Ill. 361; *Lyon v. Travelers' Ins. Co.,* 55 Mich. 141; *Life Ins. Co. v. Dunklee,* 16 Kan. 158. A worthless check is not payment. *Brady v. N. W. Mut. Aid A.,* 190 Pa. St. 595; 42 Atl. R. 962.

⁷ *Bixby v. Grand Lodge, etc.,* 101 Ia. 505; 70 N. W. R. 737.

⁸ *Kenyon v. Knights Templar, etc., Assn.,* 122 N. Y. 247; 25 N. E. R. 299; affg. 48 Hun, 279.

and if the custom or notice authorizes the inference, mailing the remittance is payment.¹ It is no excuse for non-payment of an assessment that the company owes the member a less sum if he does not offer to pay the balance.² Payment may be made to any officer authorized to receive, either in the lodge or on the street,³ any custom and usage to the contrary notwithstanding.⁴ But payment must be made to the officer authorized to receive the money, if made to any other person it must be shown that the proper person got the money.⁵ If, however, the laws authorize the secretary to employ an assistant and by custom the wife of the secretary has acted as such assistant and received the payments, a payment to her will be good.⁶ Unless the laws of the order provide that local, or subordinate, lodges may extend credit for assessments, this cannot be done, and if, by the rules of the society, non-payment of an assessment *ipso facto* works a suspension, or forfeiture, then the only thing that will save the non-paying member is for his lodge to pay the assessment for him. This it may do unless its laws forbid, and in event of its paying the assessment the member becomes the debtor of the lodge. But if the laws of the order require that to suspend a member for non-payment of an assessment some affirmative action be taken by the lodge, failure on the part of the latter to do such affirmative act, required to effect a

¹ *Primean v. National L. Assn.*, 28 N. Y. Supp. 796.

² *Hollister v. Quincy Ins. Co.*, 118 Mass. 478.

³ *Manson v. Grand Lodge, etc.*, 30 Minn. 509; 16 N. W. Rep. 395.

⁴ *Ibid.*

⁵ *Lanzensky v. Supreme Lodge, etc.*, 20 N. Y. St. Rep. 795; *Farrie v. Supreme Council, etc.*, 15 N. Y. St. Rep. 155; *Roeding v. Sons of Moses*, 11 N. Y. Supp. 712; *Littleton v. Wells (Md.)*, 56 Atl. R. 798; *Toelle v. Central Verein*, 97 Wis. 322; 72 N. W. R. 630; *Teeter v. United L. Assn.*, 159 N. Y. 411; 54 N. E. R. 72; affg. 42 N. Y. Supp. 119.

⁶ *Anderson v. Supreme Council. O. C. F.*, 135 N. Y. 107; 31 N. E. R. 1092; affg. 16 N. Y. Supp. 947, and see *Supreme Lodge, etc. v. Davis*, 26 Colo. 252; 58 Pac. R. 595.

suspension, does not change the *status* of the delinquent member who remains in good standing until suspended by the lodge. This failure on the part of the lodge to take action may virtually amount to giving credit, for the member may pay up before anything is done. And the lodge thus remiss in its duty is of course responsible to its superior for its action.¹ Payment can be made within the time allowed by the notice though the member be dead,² and even if not paid, when the member dies before the time of payment has expired, no forfeiture can be claimed.³

§ 384. **What does not Excuse non-Payment.** — Neither insanity, sickness nor absence is an excuse for non-payment of assessments, the payment being an act that can be performed for the member by some other person.⁴ Nor can the fact advantage that enough was due the member from another, but distinct, fund of the lodge to pay the assessment.⁵ But it would, of course, be competent for the

¹ *Borgraefe v. Supreme Lodge K. & L. of H.*, 22 Mo. App. 127; *post*, § 388.

² *Bankers L. Assn. v. Stapp*, 77 Tex. 517; 14 S. W. R. 168.

³ *Moore v. Ry. Conductors, etc. Assn.*, 90 Ia. 721; 57 N. W. R. 623. *Elmer v. Mut. Ben. L. Assn.*, 19 N. Y. Supp. 189.

⁴ *Hawkshaw v. Sup. Lodge K. of H.*, 29 Fed. Rep. 773; *Carpenter v. Centennial M. L. Assn.*, 68 Ia. 453; *Yoe v. Benev. Assn.*, 63 Md. 86; *Smith v. Sovereign Camp*, 179 Mo. 119; 77 S. W. R. 862; *ante*, § 359.

⁵ *Leffingwell v. Grand Lodge, etc.*, 86 Ia. 279; 53 N. W. R. 243; *Hansen v. Supreme L. K. of H.*, 140 Ill. 301; 29 N. E. R. 1121; *Ancient Order United Workmen v. Moore*, 1 Ky. L. Rep. 93. But to the contrary see *Elliott v. Grand Lodge*, 2 Kan. App. 230; 42 Pac. R. 1009; *Columbian, etc., v. Hopper*, 24 Ind. App. 169; 53 N. E. R. 1051; *Bertling v. Edwards*, 84 Ill. App. 471; *Fraternal A. Assn. v. Powers (Kan.)*, 73 Pac. R. 65. See also *Knights Templar, etc., Co. v. Vail*, 206 Ill. 404; 68 N. E. R. 1103; *Logsdon v. Supreme Lodge, etc. (Wash.)*, 76 Pac. R. 292; *Supreme Council, etc. v. Welsch*, 60 Kan. 858; 57 Pac. R. 115; *Albrecht v. Peoples, etc., Soc.*, 129 Mich. 444; 89 N. W. R. 44; *Supreme Lodge, etc. v. Meister*, 105 Ills. App. 47; *affd.* 204 Ill. 527; 68 N. E. R. 454. See also *Rogers v. Union Benev. Soc.*, 111 Ky. 598; 64 S. W. R. 444; 55 L. R. A. 605.

parties to agree in a competent way, as in the by-laws of the society, that sickness or any other condition of the member should excuse the payment.¹ Many orders have a provision that in case of sickness of a member his assessments shall be paid for him by the lodge. Such a law is valid but the member must bring himself within its terms by compliance with the required conditions.² Failure of a lodge to act on a card may be an excuse.³ Insolvency of the association excuses payment,⁴ or violation of charter.⁵ Or a demand for an excessive amount not authorized by the contract.⁶ But failure of the proper officer to receive the money in time does not excuse.⁷ Nor a failure of the subordinate lodge to hold meetings.⁸

§ 385. **Consequences of Non-Payment : Suspension.** — Unless the constitution and laws of the society make non-payment of an assessment operate as a forfeiture, the failure of a member to pay such assessment only makes him liable to expulsion from the society or suspension from its benefits, for which some affirmative action of the lodge, or society, is necessary, and the mere act of the secretary in marking the member's account as "suspended" is not

¹ *Grand Lodge A. O. U. W. v. Brand*, 29 Neb. 644; 46 N. W. R. 95.

² *Smith v. Sovereign Camp, etc.*, 179 Mo. App. 119; 77 S. W. R. 862; *Bost v. Supreme Council, etc.*, 87 Minn. 47; 92 N. W. R. 337; *Curtin v. Grand Lodge, etc.*, 65 Mo. App. 294; *Sleight v. Supreme Council, etc. (Ia.)*, 96 N. W. R. 1101.

³ *Schlosser v. Grand Lodge, etc.*, 94 Md. 362; 50 Atl. R. 1048.

⁴ *Burden v. Mass. S. F. Assn.*, 147 Mass. 360; 17 N. E. R. 874; *In re Equitable R. F. Assn.*, 131 N. Y. 354; 30 N. E. R. 114.

⁵ *Fogg v. Supreme Lodge, etc.*, 156 Mass. 431; 31 N. E. R. 289.

⁶ *Margesson v. Mass. Ben. Assn.*, 165 Mass. 262; 42 N. E. R. 1132; *Langdon v. Mass. Ben. A.*, 166 Mass. 316; 44 N. E. R. 226.

⁷ *Rice v. Grand Lodge, etc.*, 103 Ia. 643; 72 N. W. R. 770; *Marcoux v. Society, etc.*, 91 Me. 250; 39 Atl. R. 1027.

⁸ *Supreme Lodge, etc. v. Keener*, 6 Tex. Civ. A. 267; 25 S. W. R. 1084.

sufficient.¹ If the member is by some affirmative act suspended by the lodge, and has notice of such act and does not exercise the right of appeal secured him by the laws of the order, the action of the lodge, if such lodge had jurisdiction, is final and cannot be assailed in an action on the certificate after a member's death.² But the attempt of a superior officer, or lodge, to suspend a lodge or its members, without notice and authority to try such lodge or members, is a usurpation which cannot affect the legal rights or *status* of any one.³ Forfeiture cannot be declared after the death of the member.⁴ Neither can the payment of assessments after the death of the member, if the laws do not authorize the payment, save the forfeiture.⁵ If, however, by the laws of the society, non-payment of an assessment operates as a forfeiture, time is of the essence of the contract and the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.⁶ Judge Seymour D. Thompson, of the St. Louis Court of Appeals, thus states the rule and its modifications:⁷ "It was argued in behalf of the plaintiff,

¹ Scheu v. Grand Lodge, etc., Independent Foresters, 17 Fed. Rep. 214; Supple v. Iowa State Ins. Co., 58 Ia. 29; Columbia Ins. Co. v. Buckley, 83 Pa. St. 293; Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200; N. W. Traveling Men's, etc., Assn. v. Schauss, 148 Ill. 304; 35 N. E. R. 747; Supreme Lodge, etc. v. Kalinski, 57 Fed. Rep. 348.

² Karcher v. Supreme Lodge K. of H., 137 Mass. 368; Chamberlain v. Lincoln, 129 Mass. 70; Mulroy v. Knights of Honor, 28 Mo. App. 463.

³ Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 450; Knights of Honor v. Wickser, 72 Tex. 257; 12 S. W. R. 175.

⁴ Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200.

⁵ Brown v. Grand Council, etc., 81 Ia. 400; 46 N. W. R. 1086.

⁶ Rood v. Railway Passenger, etc., Assn., 31 Fed. Rep. 62; Bosworth v. Western M. A. Soc., 75 Ia. 582; 39 N. W. R. 903; Maginnis v. N. O. Cotton Exc., 43 La. Ann. 1136; 10 South. R. 180.

⁷ Borgraefe v. Knights of Honor, 22 Mo. App. 137, 142; see also Stewart v. Supreme Council, 36 M. A. 319. See also Lehman v. Clark,

at the bar, that there was no forfeiture in this case, because the declaration of a forfeiture is a judicial act, and neither Ada Lodge, nor any other judicatory having the power to declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section three, of law two, above quoted, it is not necessary that the lodge or any other judicatory of the order should adjudge a forfeiture against a delinquent member for non-payment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is in view of this provision, a plain distinction between this case and cases which have arisen under the constating instruments of mutual insurance companies, and other benevolent orders of this character, where the governing statute recites that for the non-payment of dues, or other named delinquency, the member *may* be suspended by the lodge or other judicatory. Here the member is not suspended, until the lodge or other designated judicatory exercises the power of suspension.¹ The reason is that, whatever right the lodge, or the order, may have against the member for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts.² But where, as in this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside, in conformity with the rules of the order, there can be no recovery upon his benefit certificate. This view is generally sustained by the authorities.³ The question

174 Ill. 279; 51 N. E. R. 222; 43 L. R. A. 658; *Scheele v. Grand Lodge, etc.*, 63 Mo. App. 277.

¹ *Olmstead v. Mut. F. Ins. Co.*, 50 Mich. 200.

² *Chamberlain v. Lincoln*, 129 Mass. 70.

³ *Ill. Masons' Benev. Soc. v. Baldwin*, 86 Ill. 479; *Rood v. Railway Passengers', etc., Assn.*, 31 Fed. Rep. 62; *Madeira v. Merchants' Exch.*,

is one of construction and we give in a note the cases not heretofore cited holding that *ipso facto* suspension resulted from non-payment and also those holding to the contrary.¹ Where the constitution provides that no benefits are to be paid while the lodge is under suspension for refusing, or

etc., Soc., 16 Fed. Rep. 749; 5 McC. 258; Yoe v. B. C. Howard M. B. Assn., 63 Md. 86; McDonald v. Ross-Lewin, 29 Hun, 87; Blanchard v. Atlantic Mut. F. Ins. Co., 33 N. H. 9; Am. Mut. Aid Soc. v. Kilburn, 7 Ky. L. Rep. 750; Sup. Lodge K. of H. v. Keener, 6 Tex. Civ. App. 267; 25 S. W. R. 1084; Forse v. Sup. L. K. of H., 41 M. A. 106; Burdon v. Mass. S. F. Assn., 147 Mass. 360; 17 N. E. R. 874; McDonald v. Supreme C., O. C. F., 78 Cal. 49; 20 Pac. R. 41.

¹ In the following cases it was held that, suspension resulted from the mere fact of non-payment of the assessment. Grand Lodge v. Marshall, 31 Ind. App. 534; 68 N. E. R. 605; Feiber v. Supreme Council A. L. of H. (La. Ann.), 36 Sou. Rep. 818; Parker v. Bankers', etc., Ass'n., 86 Ill. App. 315; Modern Woodmen v. Tevis, 117 Fed. Rep. 369; 54 C. C. A. 293; Marshall v. Grand Lodge, etc., 133 Cal. 686; 66 Pac. Rep. 25; National Union v. Shipley, 92 Ill. App. 355; Field v. National Council, etc., 64 Neb. 226; 89 N. W. R. 773; Hunter v. National Union, 197 Ill. 478; 64 N. E. R. 356; affirming 99 Ill. App. 146; Grand Lodge, etc. v. Lachman, 101 Ill. App. 213; affirmed 64 N. E. R. 1022; 199 Ill. 140; Pitts v. Hartford L. & A. Co., 66 Conn. 376; 34 Atl. Rep. 95; Fackmann v. Supreme Council R. A., 96 Wis. 133; 70 N. W. R. 1113; Bost v. Supreme Council R. A., 87 Minn. 417; 92 N. W. R. 337; Levin v. Grand Lodge, etc. (Mo. App.), 78 S. W. R. 325. In the following cases it was held that affirmative action on the part of the lodge was required. Seehorn v. Cath. Knights, etc., 95 Mo. App. 233; 68 S. W. R. 919; Osterman v. District Grand Lodge (Cal.), 43 Pac. Rep. 412; Lewis v. Western Funeral Ben. Assn., 77 Mo. App. 586; Purdy v. Bankers' Life Assn., 101 Mo. App. 91; 74 S. W. R. 486; Puber v. Grand Lodge, etc., 77 Mo. App. 472; Warwick v. Supreme Conclave, 107 Ga. 115; 32 S. E. R. 951; Supreme Conclave v. Warwick, 110 Ga. 388; 35 S. E. R. 645; Polish, etc., Soc. v. Warczak, 182 Ill. 27; 55 N. E. R. 64; Harris v. Wilson, 86 Mo. App. 406; Order of United, etc. v. McAdam, 125 Fed. Rep. 358; Jelly v. Muscatine, etc., Soc., 120 Ia. 689; 95 N. W. R. 197; High Ct., etc. v. Edelstein, 70 Ill. App. 95; Petherick v. Order of the Amaranth, 114 Mich. 420; 72 N. W. R. 262; LaMarsh v. L'Union, etc., 68 N. H. 229; 38 Atl. Rep. 1045; Supreme Lodge, etc. v. Taylor (Ala.), 24 Sou. Rep. 247; Smith v. Covenant, etc., Assn., 16 Tex. Civ. App. 593; 43 S. W. R. 819; American Counc. v. National Council, etc., 63 N. J. L. 52; 43 Atl. R. 2.

neglecting to forward the assessments to the supreme lodge, and a member dies while his lodge is suspended, the rights to benefits, which were suspended with the suspension of the lodge, are restored with its restoration.¹ A lodge may be suspended by its superior body for non-payment of an assessment,² but if the subordinate lodge was to be notified of the assessment it cannot be suspended if it never received the notice.³ And generally if notice of suspension is required by the contract it must be given.⁴ The court will construe the laws so as to avoid forfeiture, if possible.⁵

§ 385a. **Suspension of Lodge for Failure to Remit Assessments Collected from Members.** — It is usual for the by-laws of a fraternal beneficial society to provide that the failure of a subordinate lodge to remit to the superior body, within a specified time, the assessments collected from the members of such subordinate lodge, shall work a suspension of such lodge and all the rights of its members. A provision is also contained in the by-laws of many associations, that the officers of the subordinate lodge, so far as the collection and remitting of assessments is concerned, shall be the agents of the members and not of the superior body. Wherever such provisions have come before the courts they have held with practical unanimity, that the duty of the member is discharged by payment of his assessments to the officer designated by the laws of the society to receive them, and his rights will not be affected by failure of such officer of the lodge, or any other officer of

¹ *Sup. Lodge K. of H. v. Abbott*, 82 Ind. 1. For further discussion of this subject, see *ante*, § 95; *post*, § 414.

² *Peet v. Great Camp K. O. T. M.*, 83 Mich. 92; 47 N. W. R. 119.

³ *People v. Supreme Council, etc.*, 10 N. Y. Supp. 248.

⁴ *Dial v. Valley M. L. Assn.*, 29 S. C. 560; 8 S. E. R. 27; *McDonald v. Supreme Council O. C. F.*, 78 Cal. 49; 20 Pac. R. 41.

⁵ *Connolly v. Shamrock, etc., Soc.*, 43 M. A. 283.

the subordinate lodge to remit the amount collected to the supreme, or grand body. In construing a provision of this kind the Supreme Court of Michigan said:¹ “ One of the defendant’s laws provides: ‘ In receiving money from members in payment of relief fund assessments, and in all acts performed in complying with the relief fund laws of the order, the subordinate lodge and its officers are the agents of the members, and not the agents of the supreme lodge.’ It is now urged that the plaintiff cannot recover, because Mrs. Wagner’s agent, the local lodge, neglected to remit her dues to the grand lodge. This is in effect, saying to the members of the defendant: ‘ The local lodge is authorized to receive the dues from the members to be remitted to us (the supreme lodge), but you pay it there at your risk. If our agent, who is authorized to receive this money, fails to pay it to us, it is your loss, and not ours.’ A merchant might as well say to his debtors: ‘ Mr. A., my collector, is authorized to receive the money you owe me, but you must see that he gets the money to me, or you will not be relieved from liability.’ This question was before the Supreme Court of the United States in *Supreme Lodge v. Withers*,² and the court said: ‘ To invest him (the secretary) with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy-holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section, who was bound to remit them to the board of control; but they could not compel him to remit and were thus completely at his mercy. If he chose to play in the hands of the company, it was possible for him, by

¹ *Wagner v. Supreme Lodge K. of H.*, 128 Mich. 660; 87 N. W. R. 903.

² 177 U. S. 260; 20 Sup. Ct. 611; 44 L. Ed. 762.

delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction.' ”¹

§ 385b. **Reinstatement.** — The laws of benefit societies generally provide that a member, suspended for non-payment of an assessment, may be restored upon doing certain acts. On principle these laws are to receive a liberal construction. Where the rights of a suspended member were to be restored, upon his payment of arrearages, it was held that he did not have to tender the amount at a meeting of the lodge, but might pay to the proper financial officer at any place, and that no consent or action on the part of the lodge was necessary to his restoration.² So where the laws are not altogether clear, the payment and acceptance of arrearages will be held to amount to reinstatement.³ A case was recently decided in New

¹ To the same effect are the following: *Young v. Grand Lodge, etc.*, 173 Pa. St. 302; 33 Atl. Rep. 1038; *Murphy v. Independent Order, etc.*, 77 Miss. 830; 27 Sou. Rep. 624; 50 L. R. A. 111; *Brown v. Supreme Ct. I. O. F.*, 176 N. Y. 132; 68 N. E. R. 145; *Schunck v. Gegenseitiger, etc.*, 44 Wis. 375; *Supreme Tribe, etc. v. Hall*, 24 Ind. App. 316; 56 N. E. R. 780; *Supreme Ct., etc. v. Sullivan*, 26 Ind. App. 60; 59 N. E. R. 37; *Bragaw v. Supreme Lodge, etc.*, 128 N. C. 354; 38 S. E. R. 905; 54 L. R. A. 602; *Reed v. Ancient Order, etc. (Idaho)*, 69 Pac. Rep. 127; *Boward v. Bankers', etc., Assn.*, 94 Mo. App. 442; 68 S. W. R. 369; *Parliament, etc. v. Marr*, 20 App. D. C. 363; *Supreme Lodge, etc. v. Turner*, 19 Tex. C. A. 346; 47 S. W. R. 44; *United Bros., etc. v. Haymon*, 67 Ark. 506; 55 S. W. R. 948; *Polish, etc., Soc. v. Warczak*, 182 Ill. 27; 55 N. E. R. 54; *Doggett v. United Order, etc.*, 126 N. C. 417; 36 S. E. R. 26.

² *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509; 16 N. W. Rep. 395.

³ *O'Grady v. Knights of Columbus*, 62 Conn. 223; 25 Atl. R. 111; *Millard v. Supreme Council A. L. H.*, 81 Cal. 340; 22 Pac. R. 864; *Arnot v. Prudential, etc., Co.*, 17 N. Y. Supp. 710. See also *Fee v. National, etc., Assn.*, 110 Ia. 271; 81 N. W. R. 483; *Garretson v. Eq. M. L. & E. Assn.*, 93 Ia. 402; 61 N. W. R. 952; *Rice v. Grand Lodge, etc.*, 92 Ia. 417; 60 N. W. R. 726; *O'Brien v. Brotherhood, etc.*, 76 Conn. 52; 55 Atl. R. 577. As to breach of contract for reinstatement, see *Traders M. L. Assn. v. Johnson*, 200 Ill. 359; 65 N. E. R. 634; *affg. Triple Link, etc., Assn. v. Johnson*, 101 Ill. App. 559.

York,¹ in which the facts were these: The defendant issued to one Dennis a certificate of membership, to which were annexed rules and conditions, one of which required that the members should, within thirty days after the mailing of a notice of assessment, pay the same, and provided that if the assessment should not be received by the company within that time the contract should lapse and be void, but that “for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated upon paying assessment arrearages.” On February 12, 1886, a notice of an assessment was mailed to Dennis and received by him, but was not paid within the thirty days, he being stricken with apoplexy on March 8th, and remaining unconscious until March 19th, when he died. The beneficiary, on March 31st, tendered the arrearages to the company, which declined to receive them and refused to be bound by the policy. The action was brought by the assignee of the beneficiary and on the trial the court directed a verdict for the defendant. On appeal it was held that this was error, that the question as to whether the fact that the party assessed, who had paid many previous assessments, was rendered powerless, by a sudden calamity, before the expiration of the thirty days was not a “valid reason” within the meaning of the contract, should have been submitted to the jury. In this case, the majority of the court say: “What right would the member have had if he had recovered his reason on the day he died. In the first place, the words were intended to be operative. The defendant obtained the premiums or agreement to pay assessments upon them. They assured the members that, if a valid reason was furnished for the default, it should not be conclusive. The use of the restrictions as to the validity

¹ *Dennis v. Massachusetts Ben. Assn.*, 47 Hun, 338; one judge, however, dissented.

of the excuse to the officers of the company did not mean to make them sole arbiters of the validity of the reason. The company illustrate by citing an instance of a good excuse by the term 'such as a failure to receive notice of an assessment.' If an assessment notice had not been received without the fault of the member, can it be doubted but that the officers were bound to acknowledge it and reinstate the member upon payment of arrearages? The company say that is a good excuse and impliedly say that other good reasons for the default must be acknowledged also. The Court of Appeals have decided that a discretion given to trustees is not personal.¹ Is the reason assigned a valid reason under the contract? There can be no doubt of this fact. The assessed had thirty days and before he paid the assessment he was rendered powerless by sudden calamity — his intent to pay is manifest by numerous previous payments. This was the construction put on the rule by the defendant. They again, after he was unconscious, notified the member of the forfeiture for non-payment and that the contract might be renewed if in good health. This condition, in respect to good health, is not in the rule and the officers had no right to add it to the rule. If a valid reason existed for the default the member must be reinstated, because of the valid reason for the default and not because he had a valid reason and was in good health. The rule, as created by the company in this respect, would exclude cases where it was vital that they should be included in the contract. If the good reason was rejected in cases of ill health or death the insured will lose a real value in the contract. If members become sick or die, the policy is at an end, no matter how completely the default may be excused. This

¹ *Hull v. Hull*, 24 N. Y. 674; *The Duplex Boiler Co. v. Garden*, 101 *Id.* 387.

would make a very unfair contract, not within the words of the rule and one which the company would be unwilling to print in its rules. We, therefore, think that the validity of the reason assigned should have been submitted to the jury.” A similar question arose in New Jersey,¹ the facts being as follows: The by-laws of an unincorporated mutual insurance association provided that in case a member had, for failure to pay an assessment promptly, been dropped from the association by the secretary, the board of directors should have power to reinstate him on his presenting them a reasonable excuse for such failure, and paying the sum in arrear. A member being delinquent appeared before the directors and offered a sufficient reason for his delinquency, and the board refused to reinstate him, because they alleged that his health was then precarious. He died very soon afterwards. A bill was filed against the society and the court held that it would, after the death of the member, examine into and determine the adequacy of the reason offered by the member for his delinquency, and, in a proper case, compel the association to pay the amount of the insurance. The court says: “The excuse given by Van Houten when he appeared before the board and asked to be reinstated was ample and ought to have been accepted. He had provided for payment of the money within the time limited by the by-laws by engaging Mr. Tucker, a director, to attend to the matter for him and prevent any delinquency, and Mr. Tucker had, at his request, undertaken to do so. It was merely Mr. Tucker’s forgetfulness that caused the delinquency. It appears by the answer that the excuse was considered satisfactory, but that Mr. Van Houten’s physical condition at the time of making the application was taken into the

¹ *Van Houten v. Pine*, 38 N. J. Eq. 72. Same case on demurrer, 36 N. J. Eq. 133 where note is appended.

account adversely to him. In the letter of the president to him, set forth in the answer, that is given as the only reason for denying the application. The letter states that in the opinion of a large majority of the members of the board of directors it was deemed inexpedient to restore him to membership in consequence of his impaired health. * * * It is manifest from the testimony that the by-laws were enforced against Van Houten with unwonted vigor and stringency. But conceding the right of the association to do so it was nevertheless clearly the right of Van Houten, under the circumstances, to be reinstated. And in such a suit as this, against such an association (an unincorporated mutual benefit society), and under such circumstances as this case presents, it is proper for the court to determine the question whether the member was properly excluded or not; to decide whether the action of the trustees or agents to whom the management of the affairs of the association was intrusted was lawful or not, to judge whether the member, by the imputed misconduct or delinquency, ought reasonably to be held to have forfeited his claim to the advantages which the society promised, and in view of which he had, up to the time of the alleged exclusion, discharged his duties to it.”¹ It has also been held that where a member is insane at the time the assessment is levied and an offer to pay is subsequently made he should be reinstated;² a society cannot impose conditions of reinstatement other than those prescribed by the by-laws;³ nor arbitrarily refuse reinstatement.⁴

¹ See also *Oats v. Supreme Court of Foresters*, 4 Ont. Rep. 535; also *Colley v. Wilson*, 86 Mo. App. 396.

² *McNeil v. South Tier, etc.*, 40 App. Div. 581; 58 N. Y. Supp. 119.

³ *Supreme Lodge, etc. v. Turner*, 19 Tex. Civ. A. 346; 47 S. W. R. 44; *Colley v. Wilson*, 86 Mo. App. 396.

⁴ *Knights Templar, etc., Co. v. Jacobus*, 25 C. C. A. 378; 80 Fed. R. 202; 46 U. S. App. 746; *Puschman v. Ins. Co.*, 92 Mo. App. 640; *Boward v. Bankers L. Assn.*, 94 Mo. App. 442; 68 S. W. R. 369; *Gray v. Chapter*,

§ 385c. **The Same Subject: Conditions of Reinstatement — Fraud.** — If the laws of an order provide that a member must comply with certain requirements in order to become reinstated all such conditions must be complied with.¹ So where the laws of the society provided that, in addition to payment of arrearages, the member must be re-examined by a physician and be reinstated by vote of the lodge, it was held that all these conditions must be complied with and the failure on the part of the lodge to hold meetings did not excuse the non-compliance with the last requirement, especially if the member meantime made no effort for reinstatement.² Where the suspended member paid his arrearages, but was not notified that he would have to be re-examined, but before this was done, another assessment fell due and was paid by him, it was held that there was no waiver by the society and it was not bound to return the money, the member dying before re-examination.³ And a lodge has the right to refuse to reinstate a member who was sick at the time he paid.⁴ Nor is receipt of assessments in ignorance of the member's illness waiver

etc., 70 App. Div. 155; 75 N. Y. Supp. 267; *Brun v. Supreme Council, etc.*, (Colo. App.), 63 Pac. R. 796. But see *Harrington v. Keystone, etc., Assn.*, 190 Pa. St. 77; 42 Atl. R. 523; *Reis v. Unter-Stuetzung, etc.*, 111 Mich. 127; 71 N. W. 177; *Martin v. Association*, 68 Minn. 521; 71 N. W. R. 701.

¹ *Wells v. Independent Order, etc.*, 25 Can. L. J. (N. S.) 109; *McDonald v. Supreme Council, etc.*, 78 Cal. 49; *Lehman v. I. O. Buai Brith*, 23 N. Y. Weekly Dig., 409; *Grand Lodge A. O. A. W. v. King*, 10 Ind. App. 639; 38 N. E. R. 352; *Grand Lodge, etc. v. Jesse*, 50 Ind. App. 101; *Carlson v. Supreme Council, etc.*, 115 Cal. 466; 47 Pac. R. 375; 35 L. R. A. 643; *Sovereign Camp, etc. v. Rothschild*, 15 Tex. Civ. A. 463; 40 S. W. R. 553; *Campbell v. Supreme Lodge, etc.*, 168 Mass. 397; 47 N. E. R. 109; *Sovereign Camp, etc. v. Grandon*, 64 Neb. 39; 89 N. W. R. 448; *McLaughlin v. Supreme Council, etc. (Mass.)*, 68 N. E. R. 344.

² *Supreme Lodge K. of H. v. Keener*, 6 Tex. Civ. App. 267; 25 S. W. R. 1084.

³ *Lyon v. Supreme Assembly, etc.*, 153 Mass. 83; 26 N. E. R. 236.

⁴ *Gross-Loge, etc. v. Laercher*, 41 Ill. App. 462.

of the requirement of good health at the time of reinstatement.¹ If at the time of reinstatement the member warrants that he is in good health, the fact that he was not will vitiate the reinstatement, although the representation was honestly made.² A concealment of the illness of the member by the beneficiary when applying to have him reinstated amounts to fraud and vitiates the reinstatement;³ but the burden of proving the false representations and that the member making them knew them to be false is on the society.⁴ If the laws specify certain requirements proof of a custom of the lodge to the contrary will not avail to relieve the member from compliance with the laws.⁵ Where the member mailed medical examination and application for reinstatement but returning caught cold and died the next day it was held⁶ that the right to reinstatement must be determined on the facts as they existed at the time the application was made, and their sufficiency. Reinstatement can be made on Sunday.⁷ The society cannot exact concessions on reinstatement, such as that the policy shall be for a smaller amount,⁸ and if by resolution the time for payment is extended a member in default has

¹ *Gabbutt v. Citizens, etc., Assn.*, 84 Ia. 293; 51 N. W. R. 148.

² *Richards v. Maine Ben. Assn.*, 85 Me. 99; 26 A. L. R. 1050. See also *Mutual R. F. L. A. v. Levenberg*, 24 Tex. Civ. A. 355; 59 S. W. R. 314; *Ash v. Fidelity, etc., Assn.*, 26 Tex. Civ. A. 501; 63 S. W. R. 944; *Frazer v. Ætna, etc.*, 114 Wis. 510; 90 N. W. R. 476; *Hargrove v. Royal, etc.*, 2 Ont. L. R. 79.

³ *Marshall v. Women's, etc.*, 11 N. Y. Supp. 700; *Grand Lodge A. O. U. W. v. Cressy*, 47 Ill. App. 616.

⁴ *Lindsey v. Western Mut. Aid Soc.*, 84 Ia. 734; 50 N. W. R. 29; *Patton v. U. S. Life Ins. Assn.*, 24 N. Y. Supp. 269.

⁵ *Dickinson v. Grand Lodge, etc.*, 159 Pa. St. 258; 28 Atl. R. 293. But see *Andre v. Modern Woodmen*, 102 Mo. App. 377; 76 S. W. R. 710.

⁶ *Jackson v. Northwestern, etc., Assn.*, 78 Wis. 463; 47 N. W. R. 733.

⁷ *Frame v. Sovereign Camp, etc.*, 67 Mo. App. 127.

⁸ *Davidson v. Old People's, etc., Soc.*, 39 Minn. 303; 39 N. W. R. 803; *Ingram v. Supreme Council, etc.*, 14 N. Y. St. R. 600.

the right to pay up if within the time.¹ The payment of arrearages on reinstatement may, under the contract add new conditions.² But it has been held that unreasonable conditions will not be enforced.³ If a member neglects to become reinstated during his lifetime he cannot be reinstated after his death, though the period in which he might be reinstated if living has not expired.⁴ A restoration to membership, however, after illegal suspension, may be made by a superior officer even after the member is dead if the laws of the society so warrant.⁵ It has been decided that where the local lodge is guilty of irregularities in the reinstatement the member will not be held responsible therefor, especially when he has paid subsequent assessments, but the superior body will be deemed estopped by such action and receipt of assessments.⁶ A member may acquiesce in a wrongful suspension and thereby lose the right to reinstatement.⁷

§ 386. To whom Money Collected on an Assessment Belongs. — Where assessments are made to replenish a fund

¹ *Wertheimer v. Schuster*, 18 N. Y. Supp. 345.

² *Ronald v. Mut. Reserve F. L. Assn.*, 132 N. Y. 378; 30 N. E. R. 739. affg. 10 N. Y. Supp. 632.

³ *Brown v. Supreme Court, etc.*, 66 App. Div. 259; 72 N. Y. Supp. 806; *Finnerty v. Supreme Council, etc.*, 115 Ia. 398; 88 N. W. R. 834.

⁴ *Modern Woodmen, etc., v. Jameson*, 48 Kan. 718; 31 Pac. R. 733; 30 Pac. R. 460; *Bagley v. Grand Lodge, etc.*, 31 Ill. App. 618; *Brown v. Grand Council, etc.*, 81 Ia. 400; 46 N. W. R. 1086.

⁵ *Connolly v. Masonic, etc., Assn.*, 58 Conn. 552; 20 Atl. R. 671.

⁶ *Hoffman v. Supreme Council. A. L. H.*, 35 Fed. R. 252; *Geiger v. Grand Lodge, etc.*, 15 N. Y. St. R. 455; *Coburn v. Life Indemnity Co.*, 52 Minn. 424; 54 N. W. R. 373; *Loughridge v. Ia. L. & E. Assn.*, 84 Ia. 141; 50 N. W. R. 568.

⁷ *Teeter v. United L. Assn.*, 159 N. Y. 411; 54 N. E. R. 72; affg. 42 N. Y. Supp. 119. See also *Bagley v. Mut. Res. F. L. A.*, 39 App. Div. 655; 57 N. Y. Supp. 1133. An instructive case is *Grand Lodge v. Scott (Neb.)*, 97 N. W. R. 637; reversing 93 N. W. R. 190. See also *ante*, § 111.

and not to pay particular losses, the representatives of a member are sharers in the fund and not the owners of any specific portion of it levied for their exclusive use.¹ This is true even where a list of deaths is given in the assessment notice.² Money received by the trustees of a mutual benefit association, from an assessment imposed upon the members to pay to the widow of a deceased member the amount which she is entitled to recover, belongs to the association and not to the widow.³ And it cannot be claimed that, when such an association has received the money from an assessment for the purpose of paying a claim on a certificate issued to a deceased member of the society, the association thereby became the agent of its members for the purpose of paying the money upon the claim and had no right to contest its validity or withhold the payment of the money. While the society is in a certain sense the agent of the members of the company, it is an agent with special and definite powers and limitations, and the true and obvious construction of these powers and limitations forbids payment upon a claim which it is able to show was procured through misrepresentation or fraudulent suppression of facts, concerning which it required answers from the deceased member when he applied for membership. That the association has realized the money with which to make payment is no waiver of the duty to see to it that payment was due. That duty it still owes to its members who have paid their assessments trusting to the fidelity of the company to protect them and the

¹ *Reeves v. Supreme Lodge Patriarchs, etc.*, 65 Kan. 860; 70 Pac. R. 357.

² *People v. Grand Lodge, etc.*, 156 N. Y. 533; 51 N. E. R. 299; *Ellerbe v. United Mas. Ben. Assn.*, 114 Mo. 501; 21 S. W. R. 843; also *same v. Farmers', etc., Assn.*, 106 Mo. 13; 16 S. W. R. 683. As to equities in fund see *Blair v. Sup. Cl. A. L. H. (Pa.)*, 57 Atl. R. 564.

³ *Fisher v. Andrews*, 37 Hun, 176.

fund from invalid claims.¹ Notwithstanding these decisions it is still questionable whether, when the society, or company, becomes insolvent, the fund collected on an assessment to pay particular death losses is not impressed with a trust for that purpose so as not to be taken for the general debts of the society.² Under the statutes, however, of the State all funds on hand at the time of or received after, insolvency, may go into one general fund.³ The fund collected on assessments is the property of the local body until remitted.⁴

§ 387. **Authority to Accumulate Surplus from Assessments.**—A benefit society cannot accumulate a reserve fund, or surplus in excess of the amount required to pay death claims, unless its laws confer such authority and there is nothing to the contrary in the statutes of the State authorizing the society.⁵ Under the Massachusetts statute it has been held that societies organized under it cannot become financial institutions with the capacity of accumulating and holding funds to an unlimited amount, but can only hold at one time the amount of one assessment.⁶ Nor can assessments to pay death losses be used for current expenses.⁷ Under present statutes relating to fraternal beneficiary orders authority is usually given to accumulate a reserve fund.

¹ *Mayer v. Equitable Reserve Fund L. Assn.*, 42 Hun, 237. See also *Sweitt v. Relief Society*, 78 Me. 541.

² *In re Protection L. Ins. Co.*, 9 Biss. 188; *Wadsworth v. Tradesmen's, etc.*, 132 N. Y. 540; 29 N. E. R. 1104; *In re Equitable R. F., etc., Assn.*, 131 N. Y. 354; *Wilbur v. Tergesson*, 24 Ill. App. 119; *Fisher v. Andrews*, 37 Hun, 176.

³ *Ellerbe v. Aid Assn.*, 106 Mo. 13; *Ellerbe v. United Masonic, etc., Assn.*, 114 Mo. 501; 21 S. W. R. 843.

⁴ *Supreme Sitting, etc., v. Grigsby*, 178 Ills. 57; 52 N. E. R. 956.

⁵ *Hogan v. Pacific Endowment L.*, 99 Cal. 248; 33 Pac. R. 924.

⁶ *Crossman v. Massachusetts Ben. Assn.*, 143 Mass. 435; 9 N. E. R. 753.

⁷ *Chicago M. L. Assn. v. Hunt*, 127 Ill. 257; 20 N. E. R. 55.

§ 388. Power of Subordinate Lodges to Waive Requirements of Laws of the Order as to Assessments. — It has been held that subordinate lodges cannot waive the requirements of the laws of the order of which they are constituent parts in regard to assessments;¹ but questions of waiver and estoppel in regard to assessments by benefit societies will be more appropriately discussed in a subsequent chapter upon the subject of waiver and estoppel in general and to that the reader is referred.²

§ 389. Dues. — When the affairs of a mutual benefit society are conducted by means of a complex organization consisting of grand, or supreme, and subordinate lodges, the members of the latter enter into an obligation to pay two kinds of contributions. The first is the assessments, levied by the superior authority to meet death benefits; the second is the amount required to be paid, in monthly or quarterly installments to the subordinate lodge for its support. In some associations, not consisting of local and grand lodges, a stated sum is to be paid annually or oftener, in addition to assessments on death claims, for the expenses of the organization. The first class of contributions, of which we have already treated, is called “assessments,” the second is known as “dues.” The laws of the orders generally provide that the dues be paid by each member at certain times without notice and no action of the lodge or its officers is required to make them due and payable. The provisions of the laws in this respect are also part of the contract and their construction is governed by the same rules as the provisions in respect to the assessments. If

¹ *Borgraefe v. Sup. Lodge K. & L. of H.*, 22 Mo. App. 127; *Harvey v. Grand Lodge, etc.*, 50 M. A. 472; *Lyon v. Supreme Assembly, etc.*, 153 Mass. 83; 26 N. E. R. 236; *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101.

² *Post*, §§ 431, 434a et seq.; *ante*, § 383.

nonpayment of the dues works a forfeiture, the provisions of the laws are to be strictly construed. Non-payment of dues, however, if so stipulated, will of itself work a forfeiture,¹ or a member can be dropped without notice.² But if not so provided in the by-laws, expulsion, or suspension for non-payment of dues, must be upon trial and after due notice.³ Unless the by-laws so provide, dues for the monthly, quarterly, or semi-annually term are not payable in advance and a member is not in arrears for their non-payment until after that term has ended. If the dues are payable in advance the insolvency of the association after they have become due will not excuse payment.⁴ In a case where the by-laws provided that a member should not be in good standing who was more than six months in arrears,⁵ it was held that the six months began to run from the day after the last day of the term for which the dues were to be paid. In this case the court said: "Each lodge has the power to regulate that matter for itself, may make the dues payable in advance, or at the end of the period for which they are leviable; but the pay-day does not come until the time fixed for it, and they cannot, in the nature of the words used to impose the forfeiture insisted upon,

¹ *Mandego v. Centennial Mut. Life Assn.*, 64 Ia. 134; *American Mut. Aid Soc. v. Helburn*, 8 Ky. L. Rep. 627; 2 S. W. Rep. 495; *Brown v. Grand Council*, etc., 81 Ia. 400; 46 N. W. R. 1086.

² *Lapierre v. L'Union St. Joseph*, 21 Low. Can. Jur. 332. See also *Riddick v. Farmers*, etc., Assn., 132 N. C. 118; 43 S. E. R. 544.

³ *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291; *Commonwealth v. Beneficial Soc.*, 2 S. & R. 141; *Commonwealth v. German Soc.*, 15 Pa. St. (3 Harris), 251; *Borgraefe v. Sup. L. K. of H.*, 22 Mo. App. 127; *Wachtel v. Noah Widows and Orphans' Soc.*, 84 N. Y. 28; 9 Daly, 476; *Supreme Lodge K. of P. v. Kalinski*, 6 C. C. A. 373; 57 Fed. R. 348; *Scheufler v. Grand Lodge*, etc., 45 Minn. 256; 47 N. W. R. 799; *Backdahl v. Grand Lodge*, 46 Minn. 61; 48 N. W. R. 454. See also *Rogers v. Union Benev. Soc.*, 111 Ky. 598; 64 S. W. R. 444; 55 L. R. A. 605 and note.

⁴ *Freedman v. Chamberlain*, 24 N. Y. Supp. 388.

⁵ *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Buckofzer v. U. S. Gr. Lodge*, 15 N. Y. Supp. 922.

be in arrears until that day is past, whatever day it be. The fact that the members may pay the dues at any time during the term, that is to say, in advance of the day fixed for obligatory payment, does not at all affect the question; nor does the fact, if it be so, that most of the members do pay before the final day of reckoning the charge, affect it; nor does the opinion of the members, or of the officers of the lodge, or of the lodge itself affect it. These words of the by-laws become part of the contract for life insurance, and, in the courts, must receive the ordinary interpretation put upon the contracts containing them.”¹ In accord with the foregoing it has been held that, where the dues are payable at the end of a period, a member is not “six months” in arrears for his dues when he owes six months’ dues, but only after six months from the time when the first quarter’s dues were payable.² Where the dues accrued weekly, but were uniformly charged and collected at the end of each quarter, the by-laws provided for forfeiture if the member should be in arrears for dues over the amount of thirteen weeks, it was held³ that a member who died a month after the last dues were paid, was entitled to benefits, as the words “accrued weekly” did not mean that the dues were payable weekly. If the dues are payable in advance they must be paid though the association be insolvent.⁴ Dues not payable in advance can be paid at any time during the term and, if no other condi-

¹ *Watson v. Jones*, 13 Wall. 679; *McMurry v. Supreme Lodge K. of H.*, 20 Fed. Rep. 107.

² *Buckofzer v. U. S. Grand Lodge, etc.*, 15 N. Y. Supp. 922. Other cases construing what is meant by “arrears” are, *Hess v. Johnson*, 41 App. Div. 465; 58 N. Y. Supp. 983; *Anthony v. Carl*, 28 Misc. 200; 58 N. Y. Supp. 1084; *Wheeler v. Lackawanna, etc., Co.*, 5 Lack. Leg. N. 97. See also *Harris v. Wilson*, 86 Mo. App. 406.

³ *Strasser v. Staats*, 13 N. Y. Supp. 167.

⁴ *Freedman v. Chamberlain*, 24 N. Y. Supp. 388; but see *Burden v. Mass. S. F. Assn.*, 147 Mass. 360; 17 N. E. R. 874.

tions are imposed, a member in arrears may regain good standing by simply paying up,¹ and when the arrearages are less than the benefits the member is entitled to the latter.² When the by-laws provided that a member "who is not more than three months in arrears for dues shall be entitled to benefits," a member, who dies on the day before the dues for the following month are payable, is entitled to them.³ If, by the by-laws of the order, or society, notice is to be given before the dues are payable, such notice is a condition precedent, which must be performed before forfeiture for non-payment can be enforced. The same rules apply to dues as to assessments in respect to notice, payment and forfeiture. The Court of Appeals of Maryland has accurately stated the law as to notice in an opinion which may here be given with advantage. The case was one involving the liability of the association for a benefit payable on the death of the member, and the defense was forfeiture for non-payment of dues. The facts are sufficiently stated in the opinion. In this case⁴ the court said: "The whole contract between the appellant association and Robertson, the insured, is contained in the certificate of membership issued to Robertson, and the rights of the parties in this case must depend upon the certificate alone. * * * The first article of the certificate of membership is as follows: '1. It is agreed, that the said Nathaniel C. Robertson, shall pay the sum of twenty-five dollars, as a membership fee; and further the sum of \$2.50 quarterly, for expenses, to be paid said association, and also such sums as may be required by the conditions hereto annexed, for mortuary assessments.' If this article was the only part of the certificate that re-

¹ Weiss v. Tennant, 21 N. Y. Supp. 252.

² Brady v. N. Y. Coachmen's Club, 14 N. Y. Supp. 272.

³ Sherry v. Operative, etc., Union, 139 Pa. St. 470; 20 Atl. R. 1062.

⁴ Mutual Endowment Ass. Assn. v. Essender, 59 Md. 463.

lated to the quarterly dues, it would have been the duty of the insured to have paid these expenses without any call or notice. But by the sixth clause in the certificate a different face is put upon the matter. That clause is in these words: '6. The holder of this certificate further agrees, and accepts said certificate upon the express condition, that if the said assessment or quarterly dues shall not be paid at the office of said association, within thirty days after date of notice, the certificate shall be null and void and of no effect.' By this latter clause the association assumed the burden of giving the insured a notice, and the insured did not forfeit his membership, if he paid his dues at any time within thirty days from the date of such notice. Taken and construed together, as the first and sixth clauses of the certificate must be, they mean this, that while the insured, Robertson, after having paid his membership fee of twenty-five dollars, agreed to pay the association two dollars and a half quarterly, the association agreed not to forfeit his membership, unless he made default in the payment of his quarterly dues and assessments for more than thirty days after they gave him notice. There is no question raised as to the assessment for deaths, but only as to the quarterly dues. Robertson may have neglected or omitted to pay his quarterly dues, but that fact alone would not, without the notice from the company, deprive him of his membership. The notice was a condition precedent to the forfeiture and it becomes important to inquire what such notice should contain. We think it quite clear that the notice contemplated by the sixth clause, must mean a notice given after the quarterly dues were payable. It does not mean a notice given in advance and before the quarterly dues were payable; for if that were so, Robertson could have been notified on the very day of the issue of the certificate (Dec. 23, 1879), that he must pay his quarterly dues for the whole of the next year or even

longer. This was certainly not contemplated by either party to the contract, and is not borne out by the language of the clause. If Robertson, then, was entitled to his notice *after* his dues were payable, the first notice that the company could properly give him, was after his first quarterly payment fell due. Then the notice given him must be reasonably in accord with the contract, and must call upon him, or notify him with reasonable certainty what he must do within the next thirty days. Now the notice actually sent to Robertson, according to the defendant's testimony, was the following: 'Baltimore, Md., April 15th, 1880. You are hereby notified, that your annual dues for the year ending April 15th, 1881, are to be paid at this office. Amount \$10. Send this notice back with your remittance, when it will be receipted and returned to you.' By that notice Robertson was called on to do what he had not contracted to do. He had contracted to pay \$2.50 at the end of each quarter, and was called on to pay ten dollars as an annual fee, and in advance. Nor did the association do what they had contracted to do. Their contract was, as we have before said, to notify the insured after his payments were due, but they in fact notified him of claims that were to fall due in the future, and demanded payment in advance against the terms of the agreement. Now, forfeitures are not favored in the law, and the courts are always ready to seize hold of any circumstances that can reasonably avoid so harsh a measure as a forfeiture. In this case the association relies upon this notice as sufficient ground for the forfeiture of the interest of Robertson in the company. But in all such cases where a forfeiture is sought to be enforced through a notice, as a condition precedent, the party seeking to enforce it must show that he has complied at least with reasonable certainty with all the conditions precedent, and the other party is entitled to such notice as his contract calls for. In the case of John-

son *v. Lyttle's Iron Agency*,¹ the court unanimously held that notice to a shareholder in which he was charged more *interest* than he ought to have been, was on that account bad, and not sufficient to cause a forfeiture of his shares, and lay down the rule that the condition precedent must be strictly complied with. While we are not inclined to adopt a rule so strict as the one laid down in this case, still there is a wide, and in our opinion fatal, variance in this case, between the notice actually given, and the one required by the terms of the contract, both in the amount required to be paid, and the time of the payment. Such a notice is wholly insufficient to work so grave a consequence as the forfeiture of a valuable interest to the insured." In a case in Illinois² the defendant was a voluntary association composed of subordinate lodges. The constitution adopted for the government of such subordinate lodges provided that "the manner of suspension for the non-payment of dues and assessments shall be detailed in the by-laws of every lodge and is left to their option." The subordinate lodge in question never adopted any by-law on the subject of suspension as required by this provision. Deceased was declared suspended from such lodge for non-payment of dues. Six days before his sudden death by heart disease, he gave the amount due to the secretary, who took the money and said he would bring the matter before the lodge at its next meeting. The court held that the suspension of deceased was without authority and void and that the payment was in time. Further, that the fact that the lodge, in the absence of a by-law, was accustomed to pursue a particular course in regard to suspensions, did not in this case give such custom the force of a by-law.

¹ 5 Chan. Div. 687.

² District Grand Lodge *v. Cohn*, 20 Bradw. 335. See also *Dickinson v. Grand Lodge, etc.*, 159 Pa. St. 258; 28 Atl. R. 293, as to inadmissibility of proof of custom. As to waiver of fine, *People v. Sciacca Assn.*, 56 App. Div. 341; 67 N. Y. Supp. 751.

CHAPTER XII.

MATURITY OF CONTRACT: PROOFS OF LOSS: GOOD STANDING.

- § 395. Maturity of Life Insurance Contract: Amount to be Recovered.
- 395a. Permanent Disability: Accident.
396. Who Entitled to Receive Amount of Insurance.
- 396a. The Same Subject: Examples of Construction.
397. Rights of Creditors when Payees in Policies.
- 397a. The Same Subject.
398. Liens on Insurance Money.
- 398a. The Same Subject: Payment of Premiums with Stolen Money.
399. Creditors as Beneficiaries of Members of Benefit Societies.
400. Compliance with Terms of Policy as to Payment Relieves Insurer.
- 400a. Tribunal Created by Society to Pass on Claims: Provision that Decision of such Tribunal shall be Final.
- 400b. Wrongfully obtaining Release of Policy.
401. Conditions Precedent to Recovery to be Performed after Loss.
402. No Liability *Civiliter* at Common Law for Destruction of Human Life.
403. Conditions as to Notice and Proofs of Loss.
404. Substantial Compliance with Conditions Sufficient.
405. Notice of Loss.
406. Proofs of Loss: By Whom Made.
407. Form and Contents of Proofs.
408. To Whom and at What Place Proofs Must be Furnished.
409. When Company Refuses to Furnish Blank Forms.
410. Effect of Failure to Furnish Proofs.
411. On Receipt of Proofs of Loss Insurer must Point out Defects, if any Exist, within a Reasonable Time.
412. Objections to Proofs Must be Specific: Insurer Must not Mislead Assured.
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414. Good Standing.
- 414a. Good Standing in a Benefit Organization Contingent on Good Standing in Some Other Organization.

§ 395. Maturity of Life Insurance Contract: Amount to be Recovered. — In contracts of life insurance com-

panies and those of benefit societies, the money becomes owing from the insurer whenever the contingency insured against happens, although, generally, by the terms of the contract, it is not due or payable until a certain number of days thereafter. Life insurance companies agree to pay the amount of the insurance either upon the death of the insured, or when he shall arrive at a certain age; benefit societies undertake to pay either upon the death of the member, or when he shall become permanently disabled. Certain benefits may mature when the member is sick, but of these we have already spoken.¹ With life insurance companies and benefit societies alike, death, therefore, is generally the event which is to determine the contract and mature the liability. Unlike fire insurance contracts, where the insurer may never be called upon to pay, because the property may never burn, the undertaking of the life insurance corporations is to meet a liability, which is certain, for death is inevitable, and, if the premiums be paid by the insured according to agreement, the company must prepare to, at some time, fulfill its obligation. The sum to be paid is certain, for it is set forth, in the policy, which is, as we have seen, a valued policy, because the full amount named therein is to be paid without deduction or allowances,² for the loss is total. The contract, however, may provide for the deduction of certain premiums or indebtedness and such provisions will be enforced.³ No limit has ever been

¹ *Ante*, § 94.

² *Chisholm v. National Capital L. Ins. Co.*, 52 Mo. 215; *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith, 268.

³ *Bracher v. Equitable Life Ass. Soc.*, 42 Misc. R. 290; 86 N. Y. Supp. 557. Unearned premiums is not indebtedness. *Mutual Life Ins. Co. v. Berkley*, 97 Va. 571; 34 S. E. R. 469. As to agreements for scaling down see *Brundin v. Order Chosen Friends*, 13 App. Div. 147; 42 N. Y. Supp. 1043; *Leonard v. Charter Oak L. Ins. Co.*, 65 Conn. 529; 33 Atl. R. 511. As to contract to erect a tombstone see *Sleight v. Supreme Council, etc. (Ia.)*, 96 N. W. R. 1100. As to effect of payment of

fixed upon the amount for which one can insure his life, for human life is something which, in one sense, is priceless, and for which no compensation can be made, consequently a man's inclination or ability to pay the premiums can alone establish bounds to the insurance he may carry on his life; and when this life is ended, the amount to be recovered is that named in the contract and it cannot be questioned. When a creditor insures the life of a debtor different principles apply, for public policy neither permits a person to effect an insurance upon a life in which he has no insurable interest, nor does it allow the creditor to make the amount of his insurance upon his debtor's life disproportionate to the debt.¹ Under the contract the amount to be paid may be payable only out of a particular fund, or be limited by the sum collected from the members. As the courts take notice of these limitations they will limit the recovery as provided for in the agreement of the parties.² If a settlement with a beneficiary has been obtained by an association by fraudulent representations he can sue for damages and is not bound to first return the sum received since he may affirm the settlement and still claim damages for the fraud.³

premiums during period of disappearance, *Mut. Ben. L. Ins. Co. v. Martin*, 108 Ky. 11; 55 S. W. R. 694. As to rights on expiration tontine period, *Ellison v. Straw* (Wis.), 97 N. W. R. 168. As to funeral benefits, *Fanton v. Coachmen's Club*, 13 Misc. 245; 34 N. Y. Supp. 162.

¹ *Mitchell v. Union L. Ins. Co.*, 45 Me. 104; *ante*, § 248, *et seq.*; *post*, § 397.

² *Hesinger v. Home Ben. Assn.*, 41 Minn. 516; 43 N. W. R. 481; *Kerr v. Minn. M. Ben. Assn.*, 39 Minn. 174; 39 N. W. R. 312; *Gyllenhammer v. Home Ben. Assn.*, 24 N. Y. Supp. 930. See also *Kennedy v. Ia. Leg. of H. (Ia.)*, 99 N. W. R. 137; *McNeil v. Southern Tier, etc.*, 40 App. 581; 58 N. Y. Supp. 119; *Rambousch v. Supreme Counc. etc. (Ia.)*, 93 N. W. R. 277. As to preferences *L. Union v. Gagnon*, 8 R. App. Jud. Q. B. R. 334. As to damages on installment policy, *N. Y. Life Ins. Co. v. English* (Tex.), 70 S. W. R. 440.

³ *Wabash Val. Pr. Union v. James*, 8 Ind. App. 449; 35 N. E. R. 919.

If the fund provided for the payment of endowment claims at a certain time be insufficient to pay all in full, a member asserting his claim can only recover his pro rata share of such fund and the society, being a trustee, can assert the rights of the other claimants in opposition to the suing creditor.¹ In some States a provision of law is found that a company failing to pay a loss within the time specified in the policy or vexatiously refusing to pay shall be liable to payment in addition of an specified percentage. Such a statute is constitutional and will be enforced.² Demand must be made and suit is not such a demand as is required by the statute.³ The jury is to judge from the facts and circumstances whether the delay was vexatious and affirmative proof to that effect is not required.⁴ Such a provision has no retroactive operation.⁵ Whether interest can be recovered is not settled absolutely although there is no reason why the general rule should not be applied and interest allowed.⁶

¹ *Perpoli v. Grand Lodge Legion of the West*, 102 Cal. 592; 36 Pac. R. 936.

² *Union Central L. Ins. Co. v. Chowning*, 86 Tex. 654; 26 S. W. R. 982; *Mut. L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45; 27 S. W. R. 286; *Mutual L. Ins. Co. v. Walden* (Tex. Civ. App.), 26 S. W. R. 1012; *Mut. Reserve Fund, etc. v. Payne* (Tex. Civ. A.), 32 S. W. R. 1063; *Fidelity M. A. Assn. v. Mettler*, 185 U. S. 308; *Hartford F. Ins. Co. v. Warbritton*, 66 Kan. 93; 71 Pac. R. 278; *Lansing v. Commercial Union, etc.* (Neb.), 43 N. W. R. 756.

³ *N. W. Life Ass. Co. v. Sturdivant*, 24 Tex. C. A. 331; 59 S. W. R. 61.

⁴ *Brown v. Railway Passenger Ass. Co.*, 45 Mo. 221; *Lockwood v. Atlantic M. Ins. Co.*, 47 Mo. 50; see also *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751; 12 S. E. R. 18; *Mutual L. Ins. Co. v. Watson*, 30 Fed. R. 653; *Lester v. Piedmont, etc., Ins. Co.*, 55 Ga. 475; *Cotton States, etc., Co. v. Edwards*, 74 Ga. 220; *Hull v. Ala. Gold Ins. Co.*, 79 Ala. 93.

⁵ *Piedmont, etc., Co. v. Ray*, 50 Tex. 511.

⁶ *Modern Woodmen v. Shryock*, 54 Neb. 250; 74 N. W. R. 607; 39 L. R. A. 826; *Christie v. Iowa L.*, 111 Ia. 177; 82 N. W. R. 499; *Endowment Rank, etc. v. Allen*, 104 Tenn. 623; 58 S. W. R. 241; *Alexander v. Grand Lodge, etc.*, 119 Ia. 519; 93 N. W. R. 308; see to contrary *Pray v. Life Ins. Co.*, 104 Ia. 114; 73 N. W. R. 485.

§ 395a. **Permanent Disability: Accident.**—In some benefit societies the benefit, or part of it, is payable to the member himself if he shall become permanently disabled. What is permanent, or total, disability, within the meaning of such provisions depends upon the language used in the contract defining it. Where the constitution of a benefit society provided that a member “permanently disabled from following his or her usual or other occupation” was entitled to a benefit; and in another section defined such disability as one which should “permanently prevent the member from following any occupation whereby he or she can obtain a livelihood;” it was held,¹ that the words, “or other occupation,” in the first mentioned section, could not be held to mean “or other of the same kind;” and the definition in the latter section was conclusive against one who, disabled from his own profession, had been working at another totally dissimilar one. “Total disability” naturally means being totally disabled from all kinds of business² unless by the contract the disability is to be only from the usual occupation of the assured.³ Where the by-law

¹ *Albert v. Order of Chosen Friends* (U. S. Cir. Ct. D. Ky.), 34 Fed. Rep. 721.

² *Lyon v. Railway Passenger Ass. Co.*, 46 Ia. 631; *Saveland v. Fidelity & Casualty Co.*, 37 Wis. 174; 30 N. W. Rep. 237; *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 77.

³ *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546; 29 L. J. Ex. 340; 8 W. R. 816; affirmed 5 H. & N. 557; 29 L. J. Ex. 484; 7 Jur. (N. S.) 74, Ex. Ch.; *Hutchinson v. Supreme Tent K. O. T. M.*, 22 N. Y. Supp. 801. In the following cases the subject of disability was considered and particular contracts construed: Where an option was to be exercised but was not so that no right accrued. *Knowlton v. Bay State, etc., Assn.*, 171 Mass. 455; 50 N. E. R. 929. A broken arm may be. *Gordon v. U. S. Cas. Co. (Tenn.)*, 54 S. W. R. 98. Where right was lost by surrender of old policy and acceptance of new one. *Wood v. Mass. M. Assn.*, 174 Mass. 217; 54 N. E. R. 541. Effect of release. *Simons v. Supreme Council, etc. (N. Y.)*, 70 N. E. R. 776. General construction. *Cook v. Benefit League*, 76 Minn. 382; 79 N. W. R. 320; *Liston v. N. Y. Cas. Co.*, 28 Misc. 240; 58 N. Y. Supp. 1090; *Supreme Tent, etc. v. King*, 79 Ill. App. 145; 988

provided that a certain amount should be paid to one totally disabled from following "his usual or some other occupation" one disabled from following his usual occupation is entitled to take.¹ "Total inability to labor" means inability to work at any labor,² and where the policy covered two classes of labor the disability must extend to both.³ In a case decided by the Supreme Court of Maine,⁴ the insurance was to be paid "if the assured shall sustain bodily injuries by means aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured. In construing this the court said: "The object to be accomplished by this contract was indemnity to the plaintiff for loss of time from being wholly disabled from prosecuting his business by an injury received as specified in the policy. He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform only one, he was as effectually disabled from performing

Thayer v. Ins. Co., 68 N. H. 577; 41 Atl. R. 182; *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425; 70 N. W. R. 898; 38 L. R. A. 529; *Grand Lodge, etc. v. Orrell*, 206 Ill. 208; 69 N. E. R. 68; *Supreme Tent, etc. v. Cox*, 25 Tex. Civ. A. 366; 60 S. W. R. 971; *Scales v. Masonic, etc.*, 70 N. H. 490; 48 Atl. R. 1084; *Coad v. Travelers, etc.*, 61 N. H. 563; 85 N. W. R. 558; *Smith v. Supreme Lodge, etc.*, 62 Kan. 75; 61 Pac. R. 416; *Hoffman v. Michigan, etc., Soc.*, 128 Mich. 323; 87 N. W. R. 265; 54 L. R. A. 746; *Monahan v. Columbian, etc., Soc.*, 88 Minn. 224; 92 N. W. R. 972; *Beach v. Supreme Tent, etc.*, 177 N. Y. 100; 69 N. E. R. 281; *Shirts v. Phoenix etc., Co. (Minn.)*, 97 N. W. R. 966. As to partial recovery not allowed: *Meyer v. Manhattan L. Ins. Co.*, 144 Ind. 439; 43 N. E. R. 448.

¹ *Neill v. Order United Friends*, 28 N. Y. Supp. 928.

² *B. & O. Employee's R. Assn. v. Post*, 122 Pa. St. 519; 15 Atl. 885.

³ *Ford v. U. S. Mut. Acc. Assn. Co.*, 148 Mass. 153; 19 N. E. R. 169.

⁴ *Young v. Travelers' Ins. Co.*, 80 Me. 244; 13 Atl. Rep. 896.

his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation. * * * To entitle the plaintiff to recover, he was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business but it was sufficient if he satisfied them (the jury) that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest as long as it was reasonably necessary to effectuate a speedy cure, — so that a competent and specified physician called to treat him would direct him so to do.” In determining what is inability to follow any occupation the physical and mental attainments of the assured must both be considered.¹ The words “total disability,” used without limitation will include disability arising from old age,² but the term “sick, disabled or blind, or being otherwise disabled from work,” will not include an incapacity to work caused by old age.³ Under a provision in the laws of a society providing for payment to certificate holders who have become disabled by accident, the word, accident, will be given its primary and usual signification, as being an event that takes place without one’s foresight or expectation, and it may include an injury received by one in a common-law affray, where no fault on his part is shown.⁴

§ 396. Who Entitled to Receive Amount of Insurance. — The payee or beneficiary, is usually named both in the policies of life insurance companies and the certificates

¹ *McMahon v. Supreme Council O. C. F.*, 54 M. A. 468.

² *Dodds v. Canada Mut. Ass.*, 19 Ontario R. 70.

³ *Dunkley v. Harrison*, 56 L. T. R. 660.

⁴ *Supreme Council v. Garrigus*, 104 Ind. 133. This subject is further considered in the chapter relating to accident insurance, *post*, § 501.

of benefit societies and is the person entitled to demand and receive the sum stipulated to be paid upon the happening of the agreed contingency. The assured, or person to whom the insurance is payable under a policy of a life insurance company proper, generally has a vested interest in the contract; so, if the policy on the life of one person is payable to another and the latter die before the termination of the life insured, then, when the policy matures, the personal representatives of the assured are the proper parties to collect the amount of the insurance. While this is true as a general proposition the subject of reversionary interests in life insurance policies is one where complicated questions of conflicting rights often arise. A fund may be given direct to heirs of a deceased beneficiary instead of to his administrator.¹ Although the contrary is usually the case.² And where the insured and beneficiary die at the same time the proceeds of a policy on his life payable to the wife as beneficiary may be given to his estate and not to hers.³ So of a policy payable to wife and children if all die in the lifetime of the insured.⁴ And sometimes the survivors of the children, when these are beneficiaries, will take.⁵ A policy payable to the assured can be disposed of by will,⁶ but an administrator cannot sue on a policy payable to the legal heirs.⁷ Where he has collected and distributed the fund rights of a claimant may be lost.⁸ The

¹ *Clark v. Dawson*, 195 Pa. St. 137; 45 Atl. R. 674.

² *Millard v. Drayton*, 177 Mass. 533; 59 N. E. R. 436; 52 L. R. A. 117; *Glenn v. Burns*, 100 Tenn. 295; 45 S. W. R. 784.

³ *N. W. L. Ins. Co. v. Greiner*, 115 Mich. 639; 74 N. W. R. 187.

⁴ *Ryan v. Rothweiler*, 50 Ohio St. 595; 35 N. E. R. 679.

⁵ *Eglar v. Equitable L. A. Soc.*, 113 Wis. 90; 88 N. W. R. 927; *Ives v. Mut. L. Ins. Co.*, 129 N. C. 28; 39 S. E. R. 631. See also *Andrus v. Ins. Co.*, 168 Mo. 151; 67 S. W. R. 582.

⁶ *Golder v. Chandler*, 87 Me. 63; 32 Atl. R. 784; as to Tenn. Statute, *Rose v. Wortham*, 95 Tenn. 505; 32 S. W. R. 458; 30 L. R. A. 609.

⁷ *Schoep v. Bankers', etc., Assn.*, 104 Ia. 354; 73 N. W. R. 825.

⁸ *Voss v. Conn. Mut. L. Ins. Co.*, 131 Mich. 597; 92 N. W. R. 102.

laws of benefit societies generally provide who shall take in default of a valid designation of beneficiary, or in case the beneficiary dies in the lifetime of the member. If there is no exercise of the power of designation, or if the member survive the beneficiary, there may be a lapse of the power so that the benefit is payable to no one.¹ It has been held that if the original designation of a beneficiary is void, or if the member survives the beneficiary, the benefit is for the legal heirs of the member and the action is to be prosecuted in the name of his administrator, who is the proper party to receive the money.² But the question as to who is the party entitled to receive is one generally determined by the constitution and laws of the society and has already been considered.³ It has been held that a policy of life insurance issued to one having no insurable interest in the life insured is void and there can be no recovery thereon because it is a wager and against public policy,⁴ and the assignee is in no better condition.⁵ But the more modern and better doctrine is that the contract is

See also *Stoll v. Mut. Ben. L. Ins. Co.*, 115 Wis. 558; 92 N. W. R. 277, and *Kelly v. Conn. Mut. L. Ins. Co.*, 27 App. Div. 336; 50 N. Y. Supp. 131. Other cases bearing upon the right to sue are *Phoenix M. L. Ins. Co. v. Oppen*, 75 Conn. 295; 53 Atl. R. 586; *Leonard v. Harney*, 173 N. Y. 352; 66 N. E. 2; *Johnson v. Johnson*, 24 Ky. L. R. 422; 57 S. W. R. 469; *Travelers Ins. Co. v. Healey*, 164 N. Y. 607; 58 N. E. R. 1093; affg. 25 App. Div. 53; 49 N. Y. Supp. 29; *Kollman v. Oddfellows, etc. (Minn.)*, 68 N. W. R. 732; *Wolf v. Pearce*, 20 Ky. L. Rep. 296; 45 S. W. R. 865; *Bartlett v. Goodrich*, 153 N. Y. 421; 47 N. E. R. 794. See also cases cited in note to § 396a.

¹ *Ante*, chap. VII.

² *Rice v. New England M. Aid. Soc.*, 146 Mass. 286; 15 N. East. Rep. 624; *Rindge v. Same*, 146 Mass. 286; 15 N. E. Rep. 628; *Flynn v. Mass. Ben. Assn.*, 152 Mass. 288; 25 N. E. R. 716.

³ *Ante*, chap. VII.

⁴ *Life Insurance Co. v. McCrum*, 36 Kan. 148; 12 Pac. Rep. 517; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; *Helmetag v. Miller*, 76 Ala. 183; *ante*, § 248, *et seq.*

⁵ *Stambaugh v. Blake (Pa. St.)*, 15 Atl. R. 705.

not void, but the payee is a trustee for the personal representatives of the insured.¹ The payee of a policy who has no insurable interest may maintain an action on it, but this does not preclude the claim of the legal representatives of the assured.² The personal representatives of the insured in a life insurance policy, taken out by one who has no insurable interest in the life insured, have no right of action on such a policy against the insurer, for there is no privity of contract between them, and the insurer is not affected by a notice from such personal representatives not to pay over the money upon such a policy;³ nor has the administrator of a beneficiary any rights which could be violated by decedent in his lifetime, hence he cannot avoid a contract because of the alleged fraud of the intestate;⁴ nor have the heirs of a beneficiary any claim to money paid over on a void contract.⁵ But the personal representatives of the insured under such a policy may recover its proceeds, if the money thereon has been paid to one not having an insurable interest, less the premiums paid,⁶ unless the administrator of such person has in good faith distributed the amount so collected.⁷

¹ *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45; 27 S. W. R. 286. See *ante*, § 250*b* for other cases.

² *Pacific M. L. Ins. Co. v. Williams*, 79 Tex. 633; 15 S. W. R. 478.

³ *Bomberger v. United Brethren, etc., Soc. (Pa.)*, 6 Atl. Rep. 41; *Coon v. Swan*, 30 Vt. 6.

⁴ *McFarland v. Creath*, 35 M. A. 112.

⁵ *Smith v. Pinch*, 80 Mich. 332; 45 N. W. R. 183.

⁶ *Gilbert v. Moose*, 104 Pa. St. 74; 49 Am. Rep. 570; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643; *Amick v. Butler*, 111 Ind. 578; *Helmetag v. Miller*, 76 Ala. 183; *Dutton v. Willner*, 52 N. Y. 312; *Drysdale v. Piggott*, 8 DeG. M. & G. 546; *Lea v. Hinton*, 5 DeG. M. & G. 823; *Tateum v. Ross*, 150 Mass. 440; 23 N. E. R. 230. See also *N. Y. Life Ins. Co. v. Davis*, 96 Va. 737; 32 S. E. R. 475; 44 L. R. A. 305; *Andrews v. Union Cent. L. Ins. Co.*, 92 Tex. 584; 50 S. W. 572; *reversg.* (Tex. C. A.), 44 S. W. R. 610.

⁷ *Blake v. Metzgar*, 150 Pa. St. 291; 24 Atl. R. 755.

§ 396a. **The Same Subject: Examples of Construction.**—The determination of the rights of the payees in life insurance contracts often depends upon a construction of the particular contract, as modified by other well-established principles, such as the law of insurable interest and survivorship, and the equitable claims of personal representatives, and interested parties. These principles have already been discussed under appropriate divisions of the subject. We gather, however, in a note to this section, a number of cases adjudicating the rights of various classes of claimants, believing that they can be given here with advantage, although many sustain principles heretofore discussed and are also cited in previous portions of this work.¹

¹ The death of the member is the event which fixes the rights of the beneficiaries and upon the happening of this contingency the rights of the beneficiaries become fully vested. *Chartrand v. Brace*, 16 Col. 19; 26 Pac. R. 152; *Fisher v. Donovan*, 57 Neb. 361; 77 N. W. R. 778; 44 L. R. A. 383; *Aiken v. Mass. Ben. Assn.*, 13 N. Y. Supp. 579. See *ante*, § 264. If, however, the beneficiary dies simultaneously with the member there is a lapse of designation and the benefit will go as provided in such cases. *Paden v. Briscoe*, 81 Tex. 563; 17 S. W. R. 42. Where the policy named a different beneficiary than the application, it has been held that the former will govern. *Hunter v. Scott*, 108 N. C. 213; 12 S. E. R. 1027. But not so where the application is by the certificate made part of the contract. *Eckler v. Terry*, 95 Mich. 123; 54 N. W. 704. See *ante*, § 269. And a policy is admissible in evidence although it does not name any beneficiary if evidence follows showing by the application, the beneficiary intended. *Norristown Title, etc., Co. v. Jno. Hancock Mut. L. Ins. Co.*, 132 Pa. St. 385; 19 Atl. R. 270. A policy payable to the order of the assured is assets of his estate, as is one payable to the assured. (*Boyden v. Mass. L. Ins. Co.*, 153 Mass. 544; 27 N. E. R. 669; *In re Knoedler*, 68 Hun, 150; 22 N. Y. Supp. 608.) Where a policy was made payable to a trustee for the benefit of the mother of the assured, it has been held (*Bancroft v. Russell*, 157 Mass. 47; 31 N. E. R. 710) that upon her death in the life-time of the assured a resulting trust followed in favor of such assured; and it has also been held (*Shields v. Sharps*, 35 Mo. App. 178) that where a father insures his own life for the benefit of his children who were named in the certificate and some died during his lifetime he can, with the consent of the company, substitute other

§ 397. Rights of Creditors when Payees in Policies. — Policies of life insurance are frequently made payable, or assigned, to creditors of the insured. In such cases questions have often arisen as to who was entitled to recover

beneficiaries for those deceased, but, if he does not, he will take an inheritable share in the interest of the deceased beneficiaries and such share at his death will go to his personal representatives. See also *Wolf v. Pearce*, 20 Ky. L. Rep. 296; 45 S. W. R. 865. Where an endowment policy was payable to the assured at the end of 15 years, or, in case of his death, to his wife, her right depends upon his death during the period. *Miller v. Campbell*, 22 N. Y. Supp. 388; distinguishing *Brick v. Campbell*, 122 N. Y. 388; 25 N. E. 493; *Lamberton v. Bogart*, 46 Minn. 409; 49 N. W. 230; *Union Central L. Ins. Co. v. Woods*, 11 Ind. App. 335; 37 N. E. R. 180. Where all the beneficiaries die in the lifetime of the assured the policy reverts to the assured and can be disposed of by him. *Ryan v. Rothweiler*, 50 Oh. St. 595; 35 N. E. 679. See *ante*, § 294. A policy payable to the wife and the children of the assured is payable to the wife and the children then in being to the exclusion of after-born children. *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106; 23 Atl. R. 105. Otherwise in case of a benefit certificate. (See *ante*, § 264.) Where the administrator got possession of the policy and collected the same an administrator in another State cannot recover on the same policy. *Morrison v. Mut. L. Ins. Co.*, 10 N. Y. Supp. 445. Nor can an administrator maintain an action on a contract payable to the heirs of the assured, but the heirs can recover on such a contract although the deceased in his lifetime might have recovered a part through sickness. *Bomash v. Supreme Sitting, etc.*, Iron Hall, 42 Minn. 241; 44 N. W. 12. Where a policy was taken out by a husband payable to his wife and afterwards exchanged for one payable to his children, and the guardian of the latter, upon the death of the assured, collected the amount, the wife cannot maintain an action against the guardian because there is no privity of contract. *Wheeler v. Mortland*, 21 Ill. App. 177. The pendency of a suit in one State is no bar to a suit in another State on the same policy. *Smith v. N. Y. L. Ins. Co.*, 57 Fed. R. 33; *Insurance Co. v. Woodworth*, 111 U. S. 138. And in a suit, brought in California by an administrator of the assured, where it appears that the assignment of the policy was made with the intent to defraud the wife, such conveyance will be set aside, if in violation of the laws of the State where the suit is brought, and the estate situated, although the conveyance might have been valid by the laws of Illinois where it was made. *Smith v. N. Y. L. Ins. Co.*, 57 Fed. R. 33. As to effect of domicile of party claiming. *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85; 64 Pac. R. 103. In a recent case a member of a society

and as to the amount of the recovery. It seems settled that if there is only a reasonable margin between the amount of the debt and that of the insurance the creditor can recover and retain the entire proceeds.¹ But where the excess of the policy over the debt is so large as to indicate a wagering transaction, the creditor, if he collects the entire amount, can hold only the amount of his debt and the premiums paid by him, if any, with interest, and must account to the per-

procured a benefit certificate naming his wife as beneficiary; she died before her husband leaving a will devising all her property to her husband during his life and after his death to her daughter, and the husband also made a will giving the proceeds of the certificate to his daughter; it was held, *Brew v. Clement*, 48 Kas. 386; 29 Pac. R. 704, that the proceeds of the certificate became the property of the daughter. If the beneficiary named in the certificate has received the same upon an agreement to hold the proceeds in trust for the former beneficiaries, who accordingly delivered up for cancellation the first certificate, such person cannot, after receiving the proceeds, refuse to pay them over in accordance with the agreement, on the ground that the first beneficiaries had no insurable interest in the life of the deceased. *Hurd v. Doty*, 86 Wis. 1; 56 N. W. 371, citing numerous cases to the effect that if A. received money from B. for the purpose of paying it to C. upon an agreement between them, he cannot retain the money so received on the ground that the agreement between B. and C. was illegal. Where two claimants paid the premiums the amount of the policy will be divided in proportion to amount paid by each. *Brashears v. Metropolitan L. Ins. Co.*, 1 App. D. C. 420; *Maher v. Manhattan L. Ins. Co. (Tex.)*, 27 S. W. R. 124. As to various questions arising under assignments. *Hirsch v. Mayer*, 31 App. Div. 627; 54 N. Y. Supp. 1075; *Dusenberry v. Mut. Life Ins. Co.*, 188 Pa. St. 454; 41 Atl. R. 736; *Lehman v. Gunn*, 124 Ala. 213; 27 Sou. R. 475; 51 L. R. A. 112. As to assignee of firm. *Bartlett v. Goodrich*, 91 Hun. 642; 36 N. Y. Supp. 770; *affd.* 153 N. Y. 421; 47 N. E. R. 794. As to debt not due. *Hale v. Life Invest. Co.*, 65 Minn. 548; 68 N. W. R. 182. Generally as to questions of rights under policies. *Metropolitan L. Ins. Co. v. Anderson*, 79 Md. 375; 29 Atl. R. 606; *Hall v. American, etc., Assn.*, 96 Ga. 413; 23 S. E. R. 310; *Rosenberry v. Fidelity, etc., Assn.*, 14 Ind. App. 625; 43 N. E. R. 317.

¹ *Amick v. Butler*, 111 Ind. 578; 12 N. E. R. 513; *Batdorff v. Fehler (Pa.)*, 9 Atl. Rep. 468; *Grant v. Kline*, 115 Pa. St. 618; 9 Atl. Rep. 150. As to tontine insurance: *Hill v. U. S. Life Assn.*, 154 Pa. St. 29; 25 Atl. R. 771. Agreement to pay funeral expenses: *Burke v. Prudential Ins. Co.*, 155 Pa. St. 295; 26 Atl. R. 445. See also *ante*, § 248, *et seq.*

sonal representatives of the insured for the balance.¹ The Supreme Court of Pennsylvania on two occasions² has said that the amount of a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest thereon during the expectancy of the life insured, according to the Carlisle tables, and the premiums. If a policy of life insurance is valid when issued it does not cease to be so by the termination of the interest of the insured in the life insured, nor is it affected by the subsequent diminution of such interest, unless it is so stipulated in the contract.³ If the policy is not open to the taint of being a gambling transaction the death of the assured within a brief period will not defeat the right of the payee to recover and retain the whole proceeds.⁴ If the policy is taken out by the creditor on the life of his debtor, who pays the premiums, upon the payment of the debt the debtor is subrogated to the rights of the creditor. But if the creditor pays the premiums then his right to recover is not affected by the diminution, or payment, of the debt, or a subsequent cessation of insurable interest, nor by the fact that the debt is barred by statute of limitations or a discharge in bankruptcy. This has long been the rule in England where even though the debtor knows that his creditor intends to insure his life and

¹ *Ruth v. Katterman*, 112 Pa. St. 251; *Gilbert v. Moose*, 104 Pa. St. 74; *Cooper v. Schaefer* (Pa.), 11 Atl. Rep. 548; *Coon v. Swan*, 30 Vt. 6; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643; *Downey v. Hoffer*, 110 Pa. St. 109; 20 Atl. R. 655. See *ante*, § 248, for a discussion of the subject of insurable interest.

² *Grant v. Kline*, 115 Pa. St. 618; 9 Atl. Rep. 150; *Cooper v. Schaefer*, 11 Atl. Rep. 548.

³ *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Dalby v. India & London L. Ass. Co.*, 15 C. B. 365; 28 E. L. & E. 312; *Preston v. Neele*, 12 Ch. Div. 760; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650; *Scott v. Dickson*, 108 Pa. St. 6.

⁴ *Ulrich v. Reinoehl*, 143 Pa. St. 238; 22 Atl. R. 862; *Shaffer v. Spangler*, 144 Pa. St. 223; 22 Atl. R. 865.

regulates his conduct accordingly, still if the creditor pays the premiums and has no bargain with the debtor for repayment nor charges the premiums to him, neither the debtor nor his representatives have any claim to the money.¹ And that this is the rule also in America can hardly be doubted. In a case in the Supreme Court of New York, afterwards affirmed by the Court of Appeals,² the facts were these: The creditor, acting in his own behalf, and not under an agreement with, or as an agent of the debtor, procured a policy of insurance to be issued upon the life of the latter, to an amount not exceeding the then existing debt of the latter to him, and himself paid the premiums falling due thereon up to the time of the debtor's death. Prior to the death of the debtor, the debt was partially or fully paid and the debtor had received a discharge in bankruptcy. In an action on the policy the defense was a total want of insurable interest prior to, and at, and after the issuing of the policy. The Supreme Court held the company liable and in the course of the opinion³ said: "There being a debt at the time the policy is issued it is then valid. It contains no condition referring to the continuance of the indebtedness. But on the contrary, the policy evidences a flat and positive promise to pay a given sum at the termination of the life named. Death removes the last condition precedent except, perhaps, the delivery of proofs of the death. Then the holder becomes entitled

¹ *Courtney v. Wright*, 2 Giff. 337; 6 Jur. (N. S.) 1283; 9 W. R. 153; *Morland v. Isaac*, 20 Beav. 389; *Holland v. Smith*, 6 Esp. 11; *Bruce v. Garden*, 5 L. R. Ch. 32; 39 L. J. Ch. 334; 18 W. R. 384; *Knox v. Turner*, 5 L. R. Ch. 515; 39 L. J. Ch. 750; 23 L. T. R. 227; 18 W. R. 873; *Preston v. Neele*, 12 Ch. D. 760; 40 L. T. 303; 27 W. R. 642; *Freem v. Brade*, 2 DeG. & J. 582; 27 L. J. Ch. 697; 4 Jur. (N. S.) 748.

² *Ferguson v. Mass. Mut. L. Ins. Co.*, 32 Hun, 306; 102 N. Y. 647. See also *Manhattan L. Ins. Co. v. Hennessy*, 39 C. C. A. 625; 99 Fed. R. 64; *Townsend v. Tyndale*, 165 Mass. 293; 43 N. E. R. 107.

³ 32 Hun, 306, *supra*.

to demand the sum named in the promise. Of course, in fire policies, the nature of the promise is different. That is a contract of indemnity against loss. The nature and extent of the loss must be shown, and only to the making good of the loss is the insurer bound in the very terms of his contract. No statute has gone so far as to declare that a life policy, valid in its inception because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid.¹ Besides, from the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor, he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy. So, too, in the case at hand, if we were to hold that the policy was avoided by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its *promise, which it had not kept*. It would be the gainer by the incidental circumstance that the debtor had paid only what he justly owed his creditor or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of

¹ Goodwin v. Mass. M. L. Ins. Co., 73 N. Y. 497.

their business. We are, upon principle, prepared to agree with the English court in its conclusion in *Dalby v. India & London L. Ins. Co.*¹ Indeed, we think the doctrine of that case has been accepted in this State, and that both upon principle and authority we should say that the insurer is bound to fulfill its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom."² If a policy is effected by the creditor, either directly or indirectly, on the life of his debtor, and at the expense of the latter, under circumstances which show that the insurance was intended as a security or indemnity to the creditor, he is bound on payment of the debt to deliver up the policy.³ And generally the right of the creditor is limited by the amount of the debt.⁴ And so where the policy is payable to the creditor upon the

¹ 15 C. B. 365; 28 E. L. & E. 312.

² The court cites *Rawls v. Am. L. Ins. Co.*, 27 N. Y. 282; 36 Barb. 357; *St. John v. Am. Mut. L. Ins. Co.*, 13 N. Y. 31, and note at p. 41; *Olmstead v. Keyes*, 85 N. Y. 593.

³ *Crotty v. Union Mut. L. Ins. Co.*, 144 U. S. 621; 12 S. C. R. 749; *Roller v. Moore's Adm.*, 86 Va. 512; 10 S. E. R. 241; *Goldbaum v. Blum*, 79 Tex. 638; 15 S. W. R. 564; *Courtney v. Wright*, 2 Giff. 337; 6 Jur. (N. S.) 1283; 3 L. T. 433; 9 W. R. 153; *Holland v. Smith*, 6 Esp. 11; *Cushman v. Family Fund, etc., Soc.*, 13 N. Y. Supp. 428.

⁴ *Metropolitan L. Ins. Co. v. O'Brien*, 92 Mich. 584; 52 N. W. R. 1012, and cases last cited. See also to the same effect *Barbour v. Larne*, 106 Ky. 546; 51 S. W. R. 5; *Andrews v. Union Cent. L. Ins. Co.*, 24 Tex. C. v. A. 425; 58 S. W. R. 1039; *Mut. L. Ins. Co. v. Richards*, 99 Mo. App. 88; 72 S. W. R. 487; *Jones v. N. Y. Life Ins. Co.*, 15 Utah, 522; 50 Pac. R. 620; *Wheeland v. Atwood*, 42 W. N. C. 178. As to debt not due *Hale v. L. fe Ins. Co.*, 65 Minn. 548; 68 N. W. R. 182. As to reservation to assignor being good though assignee paid more in premiums than the share coming to him. *Light v. Lauser*, 174 Pa. St. 608; 34 Atl. R. 350. As to rights of creditors where amount paid for premiums exceeds that allowed by law. *Sternberg v. Levy*, 159 Mo. 617; 60 S. W. R. 1114; 53 L. R. A. 438. See also *Sticken v. Schmidt*, 64 Ohio St. 354; 60 N. E. R. 561. Rights under Mississippi statute, *Coates v. Worthy*, 72 Miss. 575; 18 Sou. 916.

death of the debtor the legal representatives of the latter are entitled to the proceeds of the policy after payment of the debt and premiums, provided the premiums on such policy have been either paid by the debtor, or with his express or implied assent charged to him by the creditor.¹

§ 397a. **The Same Subject.**—It is a question of fact whether the policy was intended for the person named as payee, absolutely, or only as a security, or collateral for a debt.² Where a policy is assigned as collateral security for advances the legal title passes and the assignee cannot be made to give up the policy unless such advances are paid.³ A proviso in a policy, payable to a person, or his assignee, that a claim by the assignee shall be subject to proof of interest, does not apply to one who holds it as collateral for a debt, since the assignee is a mere trustee for the debtor and must account for any surplus after payment of the debt.⁴ Where a policy was pledged for a debt and the creditor, on tender of the debt, refused to deliver the policy, but surrendered it to the company, it was held that the company was liable to the executor of the assured.⁵ And where the executor paid off the creditor and took an assignment of the policy to himself it was held upon well-settled principles, that he was only entitled to the amount paid by him to such creditor.⁶ The statute of limitations does not forbid a creditor in an accounting at the

¹ *Morland v. Isaac*, 20 Beav. 389; 24 L. J. Ch. 840, 1 Jur. (N. S.) 989; *Bruce v. Garden*, 8 L. R. Eq. 430; 20 L. T. 1002; 17 W. R. 990; *Ta-teum v. Ross*, 150 Mass. 440; *Lewy v. Gilliard*, 76 Tex. 400; 13 S. W. R. 304; *Cauthorn v. Perry*, 76 Tex. 383; 13 S. W. R. 268; *ante*, § 244, and as to wife's policy, § 294.

² *Appeal of Weiss*, 133 Pa. St. 84; 19 Atl. 311; *Tenant v. Dudley*, 22 N. Y. Supp. 876. See *ante*, § 397.

³ *Gilman v. Curtis*, 66 Cal. 116.

⁴ *Curtiss v. Etna Ins. Co.*, 90 Cal. 245; 27 Pac. R. 211.

⁵ *Hicks v. National L. Ins. Co.*, 9 C. C. A. 215; 60 Fed. R. 690.

⁶ *Burnam v. White*, 16 Ky. L. R. 241; 22 S. W. 555.

maturity of a policy from recovering premiums for a period longer than six years.¹

§ 398. **Liens on Insurance Money.** — The voluntary payment of premiums on a life insurance policy by a stranger confers upon the payor no interest in the policy.² Otherwise if the premiums or assessments are paid by a person at the request of the member, and the fact that the certificate is payable to the wife of the member does not affect the right of such person to reimbursement.³ Where a beneficiary cannot take because not within the charter classes he will have a lien for amount of assessments paid.⁴ A trustee of a life policy cannot retain from the amount collected the premiums paid by him to keep the policy alive, his claim, if any, being against the estate of the assured.⁵ Where the mortgagor of a policy of life insurance, however, became bankrupt, but continued until his death to pay the premiums, it was held that his legal personal representatives were entitled to a lien on the policy money for the amount of the premiums so paid with interest.⁶ In England it is more common than in this country for life insurance policies to be mortgaged for debts, and numerous questions

¹ *Walker v. Larkin*, 127 Ind. 100; 26 N. E. R. 684.

² *Burridge v. Rowe*, 1 Y. & C. C. C. 183; *Struitt v. Tippet*, 62 L. T. 475. To the same effect is *Grand Lodge, etc. v. Cleghorn* (Tex. Civ. A.), 42 S. W. R. 1043.

³ *McDonald v. Humphries*, 56 Ark. 63; 19 S. W. R. 234; distinguishing *Johnson v. Knights of Honor*, 53 Ark. 255.

⁴ *Tepper v. Supreme Council*, 59 N. J. Eq. 321; 45 Atl. 111; *Fodell v. Miller*, 193 Pa. St. 570; 44 Atl. R. 919; *Fodell v. R. A.*, 44 W. N. C. 498. See as to claim of divorced wife, *Hatch v. Hatch* (Tex. Civ. A.), 80 S. W. R. 411. As to illegal loan by company. *Hoover v. Union Cent. L. Ins. Co.*, 6 Ohio Dec. 432. As to pledge. *Dickey v. Pocomoke, etc.*, 89 Ind. 280; 43 Atl. R. 33.

⁵ *Love v. Love* (Pa.), 12 Atl. R. 498. This case is very brief and the reasons for the court's conclusions are not stated.

⁶ *Shearman v. British Empire, etc., Ins. Co.*, 14 L. R. Eq. 4; 41 L. J. Ch. 466; 26 L. T. R. 570; 20 W. R. 620.

have there arisen as to liens on the insurance money. In *Leslie v. French*,¹ it was held that neither a stranger nor a part owner who pays the premiums on a policy of assurance, is entitled to any lien on the policy for those payments except under the following circumstances: 1. By a contract with the beneficial owner of the policy.² 2. By reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation.³ 3. By subrogation to these rights of the trustees of some person who may have advanced money at their request, for the preservation of the property.⁴ 4. By reason of the right vested in mortgagees or other persons having a charge upon the policy, to add to that charge any moneys which have been paid by them to preserve the property. Priorities of mortgagees and creditors are determined in cases involving the disposition of proceeds of life insurance policies as when other choses in action are involved. A verbal notice to an insurance company of an assignment of policy is sufficient to give priority over subsequent assignee.⁵ Where several incumbrances or liens exist on several policies the securities will be marshaled if necessary to do justice.⁶

¹ 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561; In re *Winchelsea*, 39 Ch. D. 168.

² *Alwin v. Witty*, 30 L. J. Ch. 860; 9 W. R. 720.

³ *Clack v. Holland*, 2 W. R. 402; 9 Beav. 262; *Gill v. Downing*, 17 L. R. Eq. 316; 30 L. T. 157; 22 W. R. 360; *Todd v. Moorhouse*, 23 W. R. 155; L. R. 19 Eq. 69.

⁴ See cases cited last, *supra*.

⁵ *North British, etc., Co. v. Hallett*, 7 Jur. (N. S.) 1263; 9 W. R. 880. For other cases involving notice to the company of assignment, see *Alletson v. Chichester*, 10 L. R. C. P. 319; 44 L. J. C. P. 153; 32 L. T. 151; 28 W. R. 393; In re *Hickey*, 10 Ir. R. Eq. 117 C. A.; In re *Currie*, 13 L. R. Eq. 188; 41 L. J. Bk. 55; 20 W. R. 363; In re *Russell*, 15 L. R. Eq. 26; 27 L. T. 706; 21 W. R. 97.

⁶ *Ford v. Tynte*, 41 L. J. Ch. 758; 27 L. T. 304; *Heyman v. Dubois*, 13 L. R. Eq. 158; 41 L. J. Ch. 224; 25 L. T. 558; *Hooker v. Sugg*, 102 N. C. 115; 8 S. E. R. 919. See for other questions as to liens, *Shaw v. Cor-*

§ 398a. **Same Subject: Payment of Premiums with Stolen Money.**—It is an interesting question whether, when it is shown that the premiums on a life insurance policy have been paid with the money of another, for example by embezzled funds, the person from whom the money was embezzled can follow the fund and recover the amount of the insurance. Such a question was decided by the Court of Appeals of New York.¹ In this case the decedent misappropriated money of a partnership of which he was a member and applied a portion thereof to the payment of premiums of life insurance procured by him for his wife's benefit. The amount misappropriated exceeded the amount of the policies. It was held that the surviving partner could recover such proceeds, the wife's insurable interest in the life of the decedent not being property in the sense that it is mingled with the money converted so that only the amount of premiums could be recovered. In Illinois it was held,² that where a premium was paid with embezzled money the person from whom the money was stolen has a lien on the policy for the sum and also for the premium paid by him, if any. In actions to recover premiums paid in fraud of creditors the same rules of evidence apply as in actions to set aside voluntary conveyances.³

nell, 59 App. Div. 573; 69 N. Y. Supp. 660, revers; 68 N. Y. Supp. 1054; National Trust Co. v. Hughes, 3 Manitoba, 41; Stickwell v. Mutual L. Ins. Co. (Cal.), 73 Pac. R. 833; Cyrenius v. Mut. L. Ins. Co., 78 Hun, 365; 26 N. Y. Supp. 248. In re Conrad, 89 Ia. 396; 56 N. W. R. 535; Hicks v. National L. Ins. Co., 9 C. C. A. 215; 60 Fed. R. 690; Mandeville v. Kent, 88 Hun, 132; 34 N. Y. Supp. 622.

¹ Holmes v. Gilman, 138 N. Y. 369; 34 N. E. R. 205; affirming 18 N. Y. Supp. 56; and reversing 19 N. Y. Supp. 151.

² Hubbard v. Stapp, 32 Ill. App. 541.

³ Wagner v. Koch, 45 Ill. App. 501. See also Dayton v. H. B. Claflin & Co., 19 App. Div. 120; 45 N. Y. Supp. 1005; reversing 41 N. Y. Supp. 839.

§ 399. **Creditors as Beneficiaries of Members of Benefit Societies.** — The designation by a member of a benefit society of a person as his beneficiary, who is not of the class named in the charter or statutes authorizing the formation of such associations, is invalid, for the society has no power to provide for a fund for the benefit of any other persons than those mentioned in its charter or the statutes under which it exists.¹ And a creditor cannot recover from the society the amount of assessments paid by him for a member of such society, the designation being void, the society having no knowledge of who paid the assessments.² But it has been said,³ that although the certificate of a mutual beneficiary association contains the name of a creditor of the member as the beneficiary, contrary to the charter, yet if the certificate, or laws of the society, recognize the right to a substitution or change of beneficiary, and provide that if the member survives all the original or substituted beneficiaries, the insurance shall be for the heirs of such member, the whole contract is not thereby rendered invalid, but the administrator of the deceased member may recover the benefit. The great object of beneficiary associations is not to do a life insurance business as such and for profit, but incidentally, and for the purpose of protecting the families and dependents of their members. The benevolent feature predominates, although the member pays a consideration for the benefit to be paid to his widow or orphans or dependents. Consequently these societies were never intended to protect or

¹ *Ante*, § 244. As to wife's policy and rights of husband's creditors, see *ante*, § 294.

² *K. & L. of H. v. Burke* (Tex.), 15 S. W. R. 45; *Nix v. Donovan*, 18 N. Y. Supp. 435.

³ *Rice v. New England Mut. Aid Soc.*, 146 Mass. 248; 15 N. E. Rep. 624; *Rindge v. Same*, 146 Mass. 286; 15 N. East. Rep. 628; *Britton v. Supreme Council*, etc., 46 N. J. E. 103; 18 Atl. R. 675; *N. W. Endowment Assn. v. Jones*, 154 Pa. St. 99; 26 Atl. R. 253.

benefit creditors of the members. If the charter or statutes of the State limit the beneficiaries of the members to those of their families, or relatives, or dependents, a creditor of a member can never have any right of action against the society.¹ Under the statutes of many States the fund payable by a fraternal beneficiary society is exempt from liability either for the debts of the member or the beneficiary. Such a statute is constitutional.² In the absence of such a statute the fund after death of the member is subject to the debts of a beneficiary.³ If, though contrary to the laws of society, a certificate has been assigned to a creditor of the member and the society has paid over the amount to such creditor on the death of the member, he can only retain the amount of his debt, for security of which the assignment was made, together with the assessments paid by him on the certificate and interest, and must account to the personal representative of the deceased member for the surplus.⁴ The designation as beneficiary of a person to receive the proceeds in trust for the member's creditors is void;⁵ and under the statutes

¹ *Skilling v. Mass. Ben. Assn.*, 146 Mass. 217; 15 N. East. Rep. 566; *Fisher v. Donovan*, 57 Neb. 361; 77 N. W. R. 778; 44 L. R. A. 388; *Clark v. Supreme Council*, 176 Mass. 468; 57 N. E. R. 787.

² *Supreme Lodge, etc. v. Johnson* (Tex. C. A.), 77 S. W. R. 661. See also *Rumbold v. Supreme Council, etc.*, 206 Ill. 513; 69 N. E. R. 599; reversing 103 Ill. App. 596; *Kittel v. Domesy*, 70 App. Div. 134; 75 N. Y. Supp. 150.

³ *Meyer v. Supreme Lodge, etc.*, 72 Mo. App. 350. See also *First Natl. Bk. v. How*, 65 Minn. 187; 67 N. W. R. 994.

⁴ *Levy v. Taylor*, 66 Tex. 652. But see *Ezell v. Wolf*, 20 Ky. L. R. 296; 45 S. W. R. 865. Also *Wolf v. Pearce*, 20 Ky. L. R. 296; 45 S. W. R. 865.

⁵ *Boasberg v. Cronan*, 9 N. Y. Supp. 664. There are cases however where because of principles of estoppel an equitable assignment to a creditor has been upheld, as where the certificate was payable to the member's estate and she made a will. In *re Copeland*, 37 Misc. R. 569; 75 N. Y. Supp. 1042. Or where the member and beneficiary joined in an assignment. *Jarvis v. Binkley*, 206 Ill. 541; 69 N. E. R. 582; affg. 102

of the State, the fund, on the death of a member, may be exempt from execution.¹

§ 400. **Compliance with Terms of Policy as to Payment Relieves Insurer.**—Compliance with the terms of the contract in regard to payment of the insurance money will relieve the insurer from other claims upon the same policy. A case in point was decided in New Jersey.² There the policy provided that the sum therein named was to be paid as stated in condition five which was as follows: “The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage of the assured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied.” It was further stipulated that the policy and receipt book must be surrendered to the company before any payment could be claimed. In the application the insurer stated that he wanted the benefit paid to his son. A daughter of the insured, however, produced to the company the policy and the premium receipt book, and the company paid her the money. In a suit by the son against the company to

Ill. App. 59. Or where the beneficiary agreed to pay the fund to the executor of the member. *Peck v. Peck*, 101 Ky. 423; 41 S. W. R. 434; *Woodruff v. Tilman*, 112 Mich. 188; 70 N. W. R. 420.

¹ *Brown v. Balfour*, 46 Minn. 68; 48 N. W. R. 604.

² *State (Metropolitan Life Ins. Co.) v. Schaefer*, 50 N. J. L. 72; 11 Atl. Rep. 154. To the same effect, *Sherry v. Co-op., etc. Assn.*, 139 Pa. St. 470; 20 Atl. 1062; *Hunter v. Scott*, 108 N. C. 213; 12 S. E. R. 1027; *Thomas v. Prudential Ins. Co.*, 148 Pa. St. 594; 24 Atl. R. 82; *Ashby v. Costin*, 21 Q. B. D. 401; *Brooks v. Metropolitan L. Ins. Co. (N. J.)*, 56 Atl. R. 168; *Thomas v. Prudential Ins. Co.*, 158 Ind. 461; 63 N. E. R. 795.

recover the amount the court held that the payment to the daughter relieved the company because there was no contract or agreement to pay to the beneficiary named in the application, but to pay to the person or persons named in said condition five of the policy and in the manner therein specified. The company having paid in strict accordance with that condition was thereby discharged under its express terms from further liability. The discretion of the company in exercising its option is not reviewable even though a compromise by paying less than the face of the policy was made.¹ Suit should be brought, however, on a policy of this kind by the administrator of the insured, not by the person paying the premiums.² The contrary has been held in Kentucky where any one of the classes can sue, though a beneficiary is named in the application.³ Where the policy is payable to one of several classes at the option of the company no one has any attachable rights.⁴ Where the company has not exercised its option it must recognize a lawful assignee.⁵ And the clause is not applicable where a beneficiary is named.⁶

§ 400a. Tribunal Created by Society to Pass on Claims : Provision that Decision of Such Tribunal Shall be Final. —
If the constitution of a benefit society provide that all claims

¹ *Brennan v. Prudential Ins. Co.*, 170 Pa. St. 488; 32 Atl. R. 1042; *Metropolitan L. Ins. Co. v. O'Farrell*, 64 Kan. 278; 67 Pac. R. 835.

² *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254; 38 N. E. R. 435; *Lewis v. Metropolitan L. Ins. Co.*, 178 Mass 52; 59 N. E. R. 439; *Wokal v. Belsky*, 53 App. Div. 167; 65 N. Y. Supp. 815.

³ *Western, etc., Ins. Co. v. Galvin*, 24 Ky. L. R. 444; 68 S. W. R. 655.

⁴ *Providence Co. Sav. Bk. v. Vadnais (R. I.)*, 58 Atl. R. 454.

⁵ *Floyd v. Prudential Ins. Co.*, 72 Mo. App. 453; *Wilkenson v. Metropolitan L. Ins. Co.*, 63 Mo. App. 404.

⁶ *McNally v. Metropolitan L. Ins. Co.*, 199 Pa. St. 481; 49 Atl. R. 299. See also *Shea v. U. S. Industrial Ins. Co.*, 23 App. Div. 53; 48 N. Y. Supp. 548; *John Hancock M. L. Ins. Co. v. Lawder*, 22 R. I. 416; 48 Atl. R. 383; *Golden v. Metropolitan L. Ins. Co.*, 35 App. Div. 569; 55 N. Y. Supp. 143.

against it shall be referred to the board of directors, "whose decision shall be final," it has been held that no suit can be maintained on a death claim after it has been referred to the board of directors and payment thereof has been refused by it.¹ In the case cited upon the facts as stated, the court said: "Waiving, therefore, all questions as to whether the board of directors would be under any more obligations to approve this claim after a judgment had been rendered in favor of this plaintiff than before, it is sufficient to say that it seems clear to me that the sole power of determining whether the association should or should not pay a claim, and an assessment be ordered to pay it, is vested in this board of directors, and no court can review or re-examine their decision in that regard. The constitution says the action of the board shall be final and the courts must so treat it." In a case in Michigan² the court adhering to its former opinions in support of this rule says: "We think the ruling of the circuit judge was in accordance with the holdings of this court in *Canfield v. Great Camp of Knights of Maccabees*,³ and *Van Poucke v. Society*.⁴ An attempt has been made to distinguish this case, but we do not discover any difference in principle between the *Canfield* case and the present. That was a death claim, and the plaintiff was wholly defeated. It was sought to try by the suit at law the question of whether his policy was binding at the time of the death. The only possible difference between that

¹ *Rood v. Railway Passenger, etc.*, M. B. Assn. (U. S. Cir. Ct. N. D. Ill.), 31 Fed. Rep. 62.

² *Hembeau v. Great Camp of the Maccabees*, 101 Mich. 161; 59 N. W. R. 417. To the same effect are *Derry v. Great Hive, etc.* (Mich.), 98 N. W. R. 23; *Barker v. Great Hive, etc.* (Mich.), 98 N. W. R. 23; *Cotter v. Grand Lodge, etc.*, 23 Mont. 82; 57 Pac. R. 650.

³ 87 Mich. 626; 49 N. W. 875.

⁴ 63 Mich. 378; 29 N. W. 863. See *ante*, § 94, for extracts from opinion in this case.

and the present case is that in the present case the determination of the Great Camp was that the policy never was of binding force. But this is not sufficient to distinguish the cases in principle. The plaintiff contends that this law of the order is invalid as against public policy, for the reason that it attempts to oust the courts of jurisdiction. The same point was made in the Canfield case, and while it was not much discussed, this court held that the case was controlled by the Van Poucke case. The holding of the courts places contracts of this nature by which one becomes a member of a mutual association, and entitled to benefits in case of disability, or whose heirs are entitled to benefits in case of death, as upon a different footing than ordinary contracts between individuals. As was said in the case of *Rood v. Benefit Association*:¹ 'This is a purely voluntary association. The members of this association have, by their own organic law, provided a tribunal to hear and determine all claims against it, and I do not think any court can be invoked to review the action of the board in a matter so completely delegated to them. To attempt to enforce by suit any claim which the board of directors has acted upon, or refused to allow or approve, is equivalent to prosecuting an appeal from this board. It was certainly competent for the members of the association to agree among themselves that the action of their board of directors in reference to any claim presented against the association should be final, and there can be no doubt from the language of the clause from the constitution just quoted that they have so agreed.'² The effect of this agreement would not be to oust the court of jurisdiction in case the Great

¹ 31 Fed. 63.

² See also *Woolsey v. Independent Order of Odd-fellows*, 61 Ia. 492; 16 N. W. 576; *Anacosta Tribe v. Murbach*, 13 Md. 91; *Society v. Vandyke*, 2 Whart. 308; *Toram v. Association*, 4 Pa. St. 519; *Lantalum v. Insurance Co.*, 22 N. B. R. 14.

Camp should determine that the plaintiff was entitled to benefits but should refuse to proceed to make payment. But such is not the case here. The plaintiff has submitted his claim to the jurisdiction provided by the laws of the order, and has been defeated therein, and now applies to the courts for redress. We think it was competent, under the decisions cited, for the association to provide a law of its order to which all parties should assent, and which should make a finding of liability by the duly constituted committees of the order a condition precedent to a right to receive benefits. The plaintiff claims that the decision of this court in *Risser v. Hoyt*,¹ and other cases in which it has been held that the legislature may not impair the right of trial by jury, are inconsistent with the validity of such an engagement as the one under consideration. We fail to see how the cases have any application to the question before us. This is not a case of an attempted exclusion of remedy by the legislature, but a case where the parties have agreed that only on certain terms and under certain conditions shall a member be entitled to receive any benefits, or the beneficiary named be entitled to receive any sum in case of the death of a member. But it is claimed, further, that the company is guilty of fraud, which takes this case out of the rule laid down in *Canfield v. Great Camp of Knights of Maccabees*. The declaration alleges that, before coming into court, the plaintiff diligently prosecuted his claim for payment, and has exhausted his remedies, before the tribunals provided by the order; and the plaintiff further alleges that 'the defendant, by refusing as aforesaid, to pay said sum of money to said plaintiff, is acting in violation of the laws, rules, and regulations of said association, and is willfully seeking to defraud said plaintiff.' The only respect in which any fraud is alleged is that, at

¹ 53 Mich. 185; 18 N. W. 611.

the time Coderre became a member, the agent of the company assured Coderre that the plaintiff was a 'dependent,' within the meaning of the policy. There is no averment of any facts tending to show fraud on the part of the executive committee of the Great Camp. This being so, one of the very questions which they had to determine was the effect of any alleged statements which the plaintiff was able to prove had been made by the agent of the company. Fraud cannot be predicated upon the decision of the tribunal, constituted by the parties themselves, either as to the equity or the law of the case considered, unless, in fact, such committee acted in bad faith and oppressively. No such allegations are contained in the declaration, and the case cannot, therefore, on this ground, be distinguished from the Canfield case." Other courts, however, have declined to follow the Michigan doctrine. The Supreme Court of Illinois, for example, says:¹ "That it is competent for members of societies of this character to so contract that their rights as members shall depend upon the determination of some tribunal of their own choice, and that such determination shall be conclusive, may be conceded. But where the designated tribunal is the society itself, one of the parties to the controversy, or, what is substantially the same thing, the board of directors, which is its official and organic representative, the court will hesitate, and even refuse, to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties, or its especial representative, to be judge or arbitrator in its own case, that

¹ *Railway Passenger, etc., Assn. v. Robinson*, 147 Ill. 138; 35 N. E. R. 168; affirming 38 Ill. App. 111. To a similar effect are *McMahon v. Maccabees*, 151 Mo. 522; 52 S. W. R. 384; *Colley v. Wilson*, 86 Mo. App. 396; *Harris v. Wilson*, 86 Mo. App. 406.

even a strained interpretation will be resorted to if necessary to avoid that result. * * * The case of Rood against this same association,¹ is in point, and in that case a different result was reached. While we have the highest respect for the distinguished judge who rendered that decision, we are unable to yield our assent to its conclusions.” In a recent case² the Supreme Court of Nebraska, referring to this point, says: “A section of the rules of the department provides that all questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with the relief department, or operation thereof, whether as to the construction of language or the meaning of the regulations of the relief department, or as to any right, decision, instruction or acts in connection therewith, shall be submitted to the determination of the superintendent of the department, whose decision shall be final and conclusive, subject to the right of appeal to the advisory committee. Based upon this rule, the defendant requested an instruction that if the jury believed that the superintendent had passed upon this claim, and rejected the same, such decision was conclusive, unless an appeal had been taken to the advisory committee. This instruction was properly refused. We have no doubt of the power of members of voluntary associations to restrict themselves, at least as to matters incidental to the operation of the association, to remedies before tribunals created by the association. It is only to this extent that the rule seems to apply. It certainly does not apply to this case. In the first place, while the superintendent, immediately after notification of White’s death, did write a letter, denying White’s membership, there was no hearing before him. In so doing he was acting as the executive

¹ 31 Fed. Rep. 62.

² Burlington Voluntary, etc., Ass. v. White, 41 Neb. 547; 59 N. W. R. 747.

officer of the association in disclaiming liability, and was not judicially examining and determining a controversy between the association and one of its members. In the next place we fail to see how the association, while denying White's membership, can invoke the protection of a rule necessarily affecting members alone. Finally this was not a controversy arising during White's membership. His membership terminated with his death. Mrs. White's rights were then complete. She had no voice in the management of the association, and her interests were adverse thereto. She was not, and could not be, bound by the decision of the officers of the association. This was the view taken in the opinion of Judge Gary in *Railway Passenger, etc., Assn. v. Loomis*.¹ The Supreme Court of Illinois reversed Judge Gary's judgment, but upon an entirely different point.² In a recent case in Utah,³ the court said, concerning a provision in the by-laws of an order such as the one under discussion: "It is further contended by the appellants that the plaintiff cannot recover, because he failed and refused to submit his case to the board of arbitration, as provided in the constitution and laws of the order, after demanding a hearing. The constitution, among others, contains a provision relating to the board of arbitration, as follows: In this board is vested jurisdiction to hear and determine all controversies as to the liability of this grand lodge for any claim made against it by those claiming to be the beneficiaries of deceased members, and also as to who are entitled as beneficiaries where conflicting claims are set up; and the decision of a majority of said board shall be final and conclusive unless reversed by the grand lodge or supreme lodge, it

¹ 43 Ill. App. 599.

² *Railway Passenger, etc., Assn. v. Loomis*, 142 Ill. 560; 32 N. E. R. 424.

³ *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; 37 Pac. R. 245.

being the purpose and intention of this provision that all these rights shall thus be determined without recourse to courts of law. It then provides how appeals may be taken. It is evident that this provision is intended to cover the whole subject of conflicting or disputed claims of beneficiaries and the intention is that claimants shall not have recourse to courts of law. When individuals unite to form a voluntary association, and adopt a constitution and by-laws, the relation which exists between the members is one of contract, and the constitution and by-laws form the terms of the agreement. Such agreement is valid and binding upon them, so long as it is not in contravention of the law of the land or of public policy. As to their binding effect, there is no distinction between the constitution and the by-laws, except that it generally requires less solemnity and formality to change the latter than the former. If in either the association inserts provisions attempting to create a tribunal having the power to adjudicate upon all the property rights of members or beneficiaries arising by virtue of membership in the order, then such provisions have no more effect than a revocable agreement to submit to an award, because, otherwise, the attempt would be to usurp the functions of the sovereign power, for it alone can create judicial tribunals. In the construction of all such provisions, the courts will apply the most cautious rules in the interest of justice and fair dealing. If the constitution or agreement provides for the determination only of some particular fact or facts, or of a question where no obligation to pay a fixed sum is expressed in the contract, or where no particular thing is to be done, but only such sum is to be paid, or such thing is to be done, as may be determined by the arbitrators, then, in such and like cases, the provision or agreement to submit is binding, in the absence of fraud. The case at bar must be distinguished from these classes of cases,

however, for here the sum to be paid is definite; and the constitution, which provides in general terms, that all claims and rights of members and beneficiaries shall be submitted to the board of arbitration of its own creation, and that its decision shall be final and conclusive, is legally ineffectual to bar this action. The rule of law is well settled that in such a case an agreement to arbitrate does not preclude the parties to it from resorting to their legal remedies. Nor is a submission to arbitration, under such an agreement, a condition precedent to the bringing of an action. To hold otherwise would be an attempt to clothe such voluntary associations with power to create judicial tribunals, which would be contrary to the law of the land.”¹ It seems to us that the reasoning of the Supreme Court of Illinois is most logical and in accordance with the principles of justice. It is certainly abhorrent to a sense of justice that a corporation should be judge and jury when defendant, and should decide upon the validity of claims against itself to the exclusion of the civil courts or any rights on the part of the claimant to a review by the courts of such judgment. And in another case² it was said that stipulations as to exhausting remedies within the order before resorting to a court of law relate “not to controversies with the order itself but to controversies of members with one another within the order.” It would seem, on principle, that if the plaintiff had submitted his case to the board and after hearing it had been rejected, he would be bound as by an arbitration. He could, however, refuse to submit the case and resort to the courts in the first instance.³

¹ Bac. Ben. Soc., § 123; *Whitney v. Association*, 52 Minn. 378; 54 N. W. 184; *Seward v. City of Rochester*, 109 N. Y. 164; 16 N. E. 348; *Austin v. Searing*, 69 Am. Dec. 665; *Crossley v. Insurance Co.*, 27 Fed. R. 30.

² *Bukofzer v. U. S. Grand Lodge* (Supreme Ct. N. Y.), 15 N. Y. Supp. 922.

³ See *ante*, § 71, 72 and § 94, and *post*, § 450; *Robinson v. Templar*

Where the money due for a benefit was by the by-laws to be paid to a subordinate branch, and by it to claimant, and the money was so paid to the presiding officer of such lodge and by him embezzled, it was held that the lodge was liable for the funds.¹

§ 400b. **Wrongfully Obtaining Release of Policy.**— It sometimes happens that insurance companies make compromises, or settlements, of claims on policies, and afterwards such settlement is attacked by the beneficiary, and either a suit is brought for the balance, giving credit for the amount paid in settlement, or it is attempted by proceedings in equity to set the release aside. It has been held ² that if the agents of the company who induced the beneficiary to sign the release, took advantage of her ignorance of material facts upon which her rights depended, as well as of her ignorance of matters of law, so that she was misled and induced to act under a misconception of her legal rights, a court of equity will afford relief on the ground of fraud. In such case the release is held to be without consideration and does not prevent a collection of the balance remaining on the certificate.³ But, if the agent who settles a loss believes in good faith that the company has a valid defense to the policy and acts in good faith in making a settlement, such settlement for less than the face of the policy is supported by a valid consideration.⁴ And

Lodge, 97 Cal. 62; 31 Pac. R. 609; *Kinney v. B. & O. Employees R. Assn.*, 35 W. Va. 385; 14 S. E. R. 8.

¹ *Fisher v. Olive Branch Lodge, etc.*, 152 Pa. St. 441; 25 Atl. R. 869.

² *Order of United Commercial Travellers v. McAdam (C. C. A.)*, 125 Fed. Rep. 358. See also *Union Central L. Ins. Co. v. Caldwell*, 68 Ark. 505; 58 S. W. R. 355.

³ *Knights Templar, etc., Co. v. Crayton (Ill.)*, 70 N. E. R. 1066; *Supreme Council, etc. v. Storey (Tex. Civ. App.)*, 75 S. W. R. 901.

⁴ *Franklin Life Ins. Co. v. Villeneuve*, 29 Tex. Civ. App. 128; 68 S. W. R. 203; *North Western L. Assn. v. Findley*, 29 Tex. Civ. App. 494; 68 S. W. R. 695;

where there is nothing to show that the company acted in bad faith in giving or concealing information, or that it misled the beneficiary, the compromise will be upheld.¹ It has been held,² that where a compromise has been made under a mistaken view on the part of the assured, that it was the whole claim there need be no tender back of the amount paid. The opposite view, however, has been taken by other courts.³ If, in an action for damages for the fraud and deceit practiced by defendant in securing a settlement the complaint alleges a rescission of the settlement the action cannot be maintained.⁴

§ 401. Conditions Precedent to Recovery to be Performed After Loss.—In contracts of insurance certain things are usually to be done by the assured after a loss before he can recover, such as the giving of notice or furnishing prescribed proofs of death. The doing of these acts is a condition precedent to recovery of the insurer. It is not necessary that these conditions precedent consist of things to be done by the assured, though he is required to procure performance, for the insurer may stipulate that before he be held on his contract certain acts be done by third parties. An interesting case illustrative of this last statement, is that of *Fuller v. B. & O. Employés' Relief Assn.*, decided by the Court of Appeals of Maryland.⁵

¹ *Milne v. North Western L. Assur. Co.*, 86 N. Y. St. Rep. ; 52 N. Y. Supp. 766; *Wood v. Mass. Mut. Acc. Assn.*, 174 Mass. 217; 54 N. E. R. 541; *Simons v. Supreme Council A. L. H. (N. Y.)*, 70 N. E. R. 776.

² *Goodson v. National Masonic Acc. Assn.*, 91 Mo. App. 339.

³ *Manhattan L. Ins. Co. v. Burke*, 69 Ohio St. 294; 70 N. E. R. 74; 69 N. E. R. 1135. See also *Ins. Co. v. Hull*, 51 Ohio St. 270; 37 N. E. R. 1116; 46 American St. Rep. 571; 25 L. R. A. 37.

⁴ *Westfield v. New York L. Ins. Co. (Cal.)*, 58 Pac. Rep. 92.

⁵ 67 Md. 433; 10 Atl. Rep. 237. See also *Owens v. B. & O. R. Assn.*, 35 Fed. R. 715; also *State v. B. & O. R. Assn.*, 36 Fed. R. 655; 1 L. R. A. 75. To like effect are *Oyster v. Burlington, etc., Assn. (Neb.)*, 91

The defendant was a corporation, established by a railroad company, whose employes were required to become members of such corporation and to contribute to it certain amounts out of their wages. Members who might be injured in the service of the company, whether through the negligence of the company or not, were entitled to a certain sum. The constitution of the association provided that in all cases where death is the result of accident, before the association should pay the amount due to the beneficiary of the member killed, the person legally entitled to recover damages should release the railroad company from all claim to damages. The member of the association designated his mother as beneficiary and was killed by an accident on the road. He left a wife and child who were legally entitled to recover damages from the railroad company if the death resulted from the negligence of the latter. Such wife and child did not release the railroad company, but sued it and recovered damages by compromise. In an action brought by the beneficiary to recover the benefit promised in the certificate, the court held that the provisions of the constitution referred to were reasonable and binding upon the members and their beneficiaries and that the meaning was that no recovery could be had by any person against the association if the person legally entitled to damages made a claim for damages against the railroad company. Where a member of an association of railroad employes, whose by-laws provided that members should only be entitled to relief if injured in the "discharge of duty" in the service of the road, quit work for the day and a few minutes later, while on his way home, was killed by the cars, it was held that he was entitled to relief.¹

N. W. R. 699; 59 L. R. A. 291; *Johnson v. R. R. Co.*, 163 Pa. St. 133; 29 Atl. R. 854.

¹ *Kinney v. B. & O. Employees R. Assn.*, 35 W. Va. 385; 14 S. E. R. 8.

§ 402. **No Liability *Civiliter* at Common Law for the Destruction of Human Life.** — At common law a party is not liable *civiliter* for the destruction of human life, whatever the consequences may be, or however clearly such a destruction may involve pecuniary damage. And although one may have contract relations with another he is not legally injured by an injury to such person which affects disastrously those relations. Where an insurer has been compelled to pay the insurance on the life of a person, whose death has been caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and the wrong-doer, and no direct obligation of the latter to the former growing out of the relation of the wrong-doer to the insured, by contract or otherwise; though the loss of the insurer is due to the acts of the wrong-doer, yet as those acts affect the insurer only through his artificial relation of contractor with the insured, the loss is a remote and indirect consequence of the act of the wrong-doer, and no action therefor can be maintained against him by the insurer. It follows that where the insured is killed by the negligence of a railroad company¹ or by the willful act of an individual² no action can be maintained against the wrong-doer by an insurance company which has paid the amount of a policy upon the life of the deceased.

§ 403. **Conditions as to Notice and Proofs of Loss.** — The contract, whether contained in the policy of the ordinary life insurance company, or in the certificate, constitution and by-laws of a mutual benefit association, generally provides what shall be done by the assured upon the happening of the contingency insured against. It is competent for the parties to stipulate for such conditions as they please

¹ Conn. Mut. Life Ins. Co. v. New York & N. H. R. R. Co., 25 Conn. 265.

² Insurance Co. v. Brame, 95 U. S. 754.

in regard to notice and proofs of loss¹ although it has been held that a condition in a fire policy requiring a certificate or affidavit from the nearest magistrate, or a fire marshal, stating certain facts, is unreasonable and therefore void,² and if it is contracted that proofs of death "satisfactory to the directors" be furnished, together with such information as they "shall think necessary to establish the claim" the directors cannot capriciously demand unreasonable proof.³ The most usual requirements are that as soon as possible after the loss, notice thereof shall be given to the company and that proofs of death be afterwards furnished. The loss is generally made payable a certain period after receipt of these formal proofs of loss. Whatever these requirements are, as we shall see, they must be complied with or the company will not be liable. Nothing less than an act of God will excuse performance,⁴ although in a fire case insanity was said to be an excuse,⁵ and accident or mistake has been said to excuse.⁶ But generally the conditions must be complied with, unless performance has been waived or the insurer is, by some act of his own, estopped from setting up the condition. As for example where

¹ *Fire Insurance Companies v. Feirath*, 77 Ala. 194.

² *Universal Fire Ins. Co. v. Block*, 109 Pa. St. 535; 1 Atl. Rep. 523; *Shannon v. Hastings M. F. Ins. Co.*, 26 U. Can. C. P. 380; 2 Ont. App. 81.

³ *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782; 8 Jur. (N. S.) 506; 31 L. J. Q. B. 17; 5 L. J. (N. S.) 550.

⁴ *Gamble v. Accident Ass. Co.*, 4 Irish R. C. L. 204; *Patton v. Employers, etc., Assn. Co.*, 20 L. R. (Ir.) 93; *Forest City, etc., Ins. Co. v. School Directors*, 4 Bradw. 145; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Fire Ins. Companies v. Feirath*, 77 Ala. 194. Other cases sustaining the view that giving proofs is a condition precedent are *Life Ass. Co. v. Haughton*, 31 Ind. App. 626; 67 N. E. R. 950; *Hart v. Herrlich*, 24 Misc. 698; 53 N. Y. Supp. 776; *Supreme Lodge, etc. v. Meister*, 78 Ill. App. 649; *Harrigan v. Home L. Ins. Co.*, 128 Cal 531; 58 Pac. 180; *Fraternal Aid Assn. v. Powers* (Kan.), 73 Pac. R. 65.

⁵ *Insurance Companies v. Boykin*, 12 Wall. 433.

⁶ *Hawke v. Niagara, etc., Ins. Co.*, 23 Grant's Ch. Up. Can. 139.

notice was required to be given within five days, it was held that failure to do so forfeited the claimant's rights.¹ If the policy is silent as to the effects of a failure to furnish proofs as required, while for violation of other conditions it expressly provides that the company shall be absolved from liability, such failure will not deprive insured of his rights.² There is a radical difference between the preliminary notice and the more formal proofs of loss. Notice will not be taken for proof, or supply its place, although the proofs of death may be deemed notice.³ In some cases notice of death is not a condition precedent.⁴

§ 404. **Substantial Compliance with Conditions Sufficient.** — A substantial compliance with the terms of the contract in regard to notice and proofs of loss is all that is necessary. On this point the Supreme Court of North Carolina has well said: ⁵ “ Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But on the other hand, the insured are generally plain men, without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is

¹ *Martin v. Equitable Acc. Assn.*, 16 N. Y. Supp. 279; 61 Hun, 467.

² *Aurora F., etc., Ins. Co. v. Kranich*, 35 Mich. 289.

³ *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169.

⁴ *Stoneham v. Ocean, etc., Ins. Co.*, 19 Q. B. D. 237.

⁵ *Willis v. Germania Ins. Co.*, 79 N. C. 285. See also *Woodmen's Assn. v. Byers*, 62 Neb. 673; 87 N. W. R. 546; 55 L. R. A. 291; *Muntz v. Standard, etc., Co.*, 26 Utah, 69; 72 Pac. R. 182. The subject is also discussed in a case where the assured was required to furnish proof, if required, that the statements in the application were true. *Thompson v. Security Life & Trust Co.*, 63 S. C. 290; 41 S. E. R. 464.

that they pay the insurers so much money, and if they are burnt out the insurers pay them so much. Where, therefore, there has been good faith on the part of the insured and a substantial compliance with the contract on their part, the courts will require nothing more." Though these words were spoken of fire insurance contracts they apply to life insurance cases as well, and the cases cited in the subsequent sections practically sustain this view.¹

§ 405. **Notice of Loss.** — If notice of loss is required to be given "forthwith," or "immediately," or "as soon as possible," these words are not to receive a literal interpretation, for to do so would often be rank injustice. It is enough under such a condition to give notice within a reasonable time. What is a reasonable time depends upon the circumstances of each case and is usually a question of fact for the jury, or a mixed question of law and fact. If there is no dispute as to the facts the question is one of law for the court.² Thus, notice within five days was held to be in time,³ and, under peculiar circumstances, two months has been held not an unreasonable delay,⁴ nor thirty days, nor eleven weeks,⁵ nor four months,⁷ nor twenty-four days,⁸

¹ *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422.

² *Bennett v. Lycoming M. F. Ins. Co.*, 67 N. Y. 274; *Swan v. Liverpool L. & G. Ins. Co.*, 52 Miss. 704; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108; *Ben Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627; *Provident L. Ins. Co. v. Baum*, 29 Ind. 236; *Railway Passengers' Ass. Co. v. Burwell*, 44 Ind. 460; *Lyon v. Railway Passengers' Ass. Co.*, 46 Ia. 631; *Kimball v. Howard F. Ins. Co.*, 8 Gray, 33; *Inman v. Western F. Ins. Co.*, 12 Wend. 452; *Kingsley v. N. Eng. M. F. Ins. Co.*, 8 Cush. 393; *Erwin v. Springfield, etc., Ins. Co.*, 24 Mo. App. 145; *McFarland v. U. S. Mut. Acc. Ass.*, 124 Mo. 204; 27 S. W. R. 436.

³ *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; 20 Barb. 468; *Schenck v. Mercer Co., etc., Ins. Co.*, 24 N. J. L. (4 Zab.) 447.

⁴ *Cashau v. Northwestern Ins. Co.*, 5 Biss. 476.

⁵ *Bennett v. Lycoming, etc., Ins. Co.*, 67 N. Y. 274.

⁶ *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108.

⁷ *Palmer v. St. Paul, etc., Ins. Co.*, 44 Wis. 201.

⁸ *Field v. Ins. Co.*, 6 Biss. 121.

nor a month.¹ But under different circumstances eleven days has been held unreasonable delay,² and eighteen days,³ and a month,⁴ and seven months, notwithstanding the company, from other sources, had notice of the loss.⁵ Six days' delay was held unreasonable where the agent lived in the same town and there was no extenuating circumstances.⁶ "It is evident," says the Supreme Court of Connecticut,⁷ "from all the authorities, that the words 'forthwith,' and 'immediately' are not to receive a strict literal construction. Some time must necessarily be given. Some cases require more time, some less. To undertake to say as matter of law what shall or shall not be regarded as reasonable time must necessarily be attended with great difficulty. Extreme cases either way may easily be determined. Between them there is a wide belt of debatable grounds, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact. The court in the present case very properly submitted it to the jury and we cannot say that the verdict was wrong. The notice called for required time to collect the facts and prepare a statement, and required time for investigation both by the insured and by the magistrate. Whether the time taken was reasonable or unreasonable was a question peculiarly within the province of the jury to determine." The require-

¹ *Parsons v. Queen Ins. Co.*, 43 Up. Can. Q. B. 271; 4 Ont. App. 103; *Peoples' Mut. Acc. Assn. v. Smith*, 126 Pa. St. 317; 17 Atl. R. 605.

² *Trask v. State F. Ins. Co.*, 29 Pa. St. 198.

³ *Edwards v. Lycoming Ins. Co.*, 75 Pa. St. 378.

⁴ *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

⁵ *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142.

⁶ *Railway Passengers' Ass. Co. v. Burwell*, 44 Ind. 460.

⁷ *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553. See also *Fidelity, etc., Assn. v. Wiese*, 80 Ill. App. 499; *Phillips v. U. S. Ben. Soc.*, 120 Mich. 142; 79 N. W. R. 1; *Heywood v. Maine M. Acc. Assn.*, 85 Me. 289; 27 Atl. R. 154; *Parsons v. Grand Lodge*, 108 Ia. 6; 78 N. W. R. 676.

ment of notice is more common and necessary in fire policies than in those on lives, and most of the cases involving questions of notice are upon fire contracts. In life policies the amount is usually payable within a certain time after "due notice and proof of death" of the party insured, and the notice is not as essential an element. The custom generally is to informally notify the company of the death and receive from it blank forms to be filled up to serve for proof. In case of losses by fire there is greater need for timely notice, so that investigation may be made, for the loss may be partial and salvage result, but in life policies the death of the insured causes a total loss, which can be investigated as well later. Notice of loss need not be in writing unless the contract so requires,¹ and acting on an oral notice is waiver of a written notice,² and where two officers of the company went to the place where the loss occurred for the purpose of examining into it, it was held that notice was excused.³ The notice must substantially conform to the conditions of the contract and be given by the person, to the officer and at the place and within the time required.⁴ It may refer to affidavits filed with the company by the holder of another policy on the same life⁵ and may be given to the agent for the company, unless otherwise required by the policy.⁶ Although the

¹ *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

² *Edwards v. Travelers' Ins. Co.*, 20 Fed. Rep. 661; 22 Blatchf. 225; 122 U. S. 457.

³ *Roumage v. Mechanics' Ins. Co.*, 13 N. J. L. 110.

⁴ *Cornell v. Milwaukee, etc., Ins. Co.*, 18 Wis. 387; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Provident Ins. L. Co. v. Baum*, 29 Ind. 236; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Inland, etc., Co. v. Stauffner*, 33 Pa. St. 397; *Railway Pass., etc. v. Burwell*, 44 Ind. 460; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

⁵ *Loomis v. Eagle L., etc., Ins. Co.*, 6 Gray, 396.

⁶ *Commercial Union Ins. Co. v. State*, 113 Ind. 331; 15 N. East. Rep. 518.

notice is informal and contains much irrelevant matter, it is sufficient if it sets forth in substance the facts required and to this end it will be liberally construed.¹ If the giving of a notice within a specified time is a condition precedent to recovery, it must be performed or the company is not liable. Thus it was said² that the provisions of a policy issued by an assurance company, making it a condition precedent to the right to recover that a notice, specifying the particulars of the accident, should be delivered at the chief office of the company, in London, within seven days after its occurrence, applies to cases where, owing to the sudden character of the accident and its resulting in instantaneous death, there was nobody capable of giving the required notice, and the provision is not discharged by reason of the fact that owing to the act of God, the accident was of so sudden and fatal a character that it was impossible to have given the required notice within the specified time.³ Where notice is to be given within a certain number of days, the time runs from the date of the death.⁴ A notice under false information is not binding on the beneficiary.⁵

§ 406. **Proofs of Loss, by Whom Made.** — The assured is the party by whom notice of loss must be given and proofs furnished.⁶ But a notice from the agent of the company upon information received by him is sufficient, unless the policy provides otherwise.⁷ In cases of fire

¹ *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Rix v. Mutual Ins. Co.*, 20 N. H. 198.

² *Gamble v. Accident Ass. Co.*, 4 Ir. R. C. L. 204. But see *post*, § 505.

³ See *post*, § 505, for further discussion of this subject.

⁴ *Trippie v. Provident, etc., Assn.*, 140 N. Y. 23; 35 N. E. R. 316; 22 L. R. A. 432.

⁵ *Phillips v. U. S. Ben. Soc.*, 120 Mich. 142; 79 N. W. R. 1.

⁶ *Stimpson v. Monmouth, etc., Ins. Co.*, 47 Me. 379; *Spaulding v. Vermont, etc., Ins. Co.*, 53 Vt. 156; *Stanton v. Home F. Ins. Co.*, 21 Low. Can. Jur. 211; *State Ins. Co. v. Maackens*, 38 N. J. L. 564.

⁷ *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

insurance contracts the agent of the insured has been allowed to furnish the proofs of loss required,¹ and this is especially so where the company has previously, in effecting the insurance, recognized the agent as such.² The real party in interest has been allowed to give the notice and make proofs of loss,³ as the assignee of life policy.⁴ In general, it may be said that the conditions in insurance policies are to be construed liberally in favor of the assured and with greater strictness to the insurer because the contract is prepared by him.⁵ And so, although the policy required proofs and notice to be given by the assured and he was to give in a particular account and to submit to an examination by the company before the loss should be payable, an attaching creditor was allowed to furnish the preliminary evidence by depositions.⁶ In this case the court said: "It does not appear that the claimant is bound to comply with these requirements with technical strictness, either as to the time or manner of compliance." Notice and proofs of loss may be furnished by a testamentary guardian of minor beneficiaries, although he has not qualified as such according to the laws of the State of his domicile, but payment cannot be made of the amount of the policy to such guardian, unless he has qualified as such

¹ *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Ayers v. Hartford F. Ins. Co.*, 17 Ia. 176; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Sims v. State Ins. Co.*, 47 Mo. 54; *O'Connor v. Hartford Ins. Co.*, 31 Wis. 160; *McGraw v. Germania F. Ins. Co.*, 54 Mich. 145; *Graham v. Phoenix Ins. Co.*, 17 Hun, 156; *Findeisin v. Metropole F. Ins. Co.*, 57 Vt. 520.

² *Swan v. Liverpool L. & G. Ins. Co.*, 52 Miss. 704.

³ *Watertown Ins. Co. v. Grover*, 41 Mich. 131; *Northwestern Ins. Co. v. Atkins*, 3 Bush, 328; *Graham v. Firemen's Ins. Co. (C. C. N. Y.)*, 9 Rep. 285.

⁴ *Cannon v. Northwestern M. L. Ins. Co.*, 29 Hun, 470.

⁵ *Willis v. Germania Ins. Co.*, 79 N. C. 285; *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553; *ante*, § 404.

⁶ *Northwestern Ins. Co. v. Atkins*, 3 Bush, 328.

according to law.¹ In benefit societies the laws generally provide for the furnishing of proofs of loss by the beneficiary and the local lodge of which the deceased was a member, in which case the beneficiary is relieved from that duty.² There is little difference between the requirements of life insurance companies and benefit societies in respect to proofs, and the same principles govern in both classes of contracts.³

§ 407. **Forms and Contents of Proofs.** — It is not usual for life insurance policies, nor the by-laws of benefit societies, to prescribe either the form or contents of proofs of loss, although many contracts do contain definite requirements upon this subject. The condition is simply that the money be payable in a certain time after “due proofs of death,” or “notice and proof of death.” Upon receipt of notice of death insurance companies, and generally benefit societies, send to the assured blank forms for execution, consisting of certain questions to be answered and sworn to by the assured, the physician attending the deceased in his last illness, the clergyman and undertaker officiating at the funeral, and a friend of the deceased. In benefit societies the lodge also usually certifies that the member was in good standing at the time of his decease, that a certain person is the lawful beneficiary and that the claim is just. If a policy of life insurance is payable

¹ *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580; 14 N. East. Rep. 811.

² *Supreme Council, etc. v. Boyle*, 10 Ind. App. 301; 37 N. E. R. 1105; *Order Chosen Friends v. Austerlitz*, 75 Ill. App. 74; *Doggett v. United Order, etc.*, 126 N. C. 477; 36 S. E. 26; *Supreme Council v. Landers*, 23 Tex. Civ. A. 625; 57 S. W. R. 307; *Murphy v. Independent Order, etc.*, 77 Miss. 830; 27 Sou. R. 624; 50 L. R. A. 111.

³ *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Payne v. Mut. Relief Soc.*, 6 N. Y. St. Rep. 365; 17 Abb. N. C. 53; *Gellatly v. Minn. Odd Fellows', etc., Soc.*, 27 Minn. 215; *Kansas Prot. Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275; *Lazensky v. Supreme L. K. of H.*, 31 Fed. Rep. 529.

in a certain time after "due notice and proof of the death," this means such reasonable proof as will give assurance that the event has happened and will satisfy the rules of evidence, and what is due proof cannot be determined arbitrarily by the company, as, for example, that a physician's certificate of the death be deemed an essential part of the proof, although the company has a usage to that effect. Such usage to be binding on the assured must be made known to him before issuance of the policy.¹ A requirement in the policy that the company shall be furnished with satisfactory proofs of the death of the assured does not entitle the company to demand information as to the cause of death.² Nor full particulars of the death.³ A provision that the proofs must show the justness of the claim does not require the claimant to prove that death was not from suicide, though the requirement of itself is not unreasonable.⁴ But if documentary evidence is required by the contract it must be furnished.⁵ Or a medical certificate.⁶ And a mere affidavit of the undertaker is not a compliance with the requirement that the claimant shall furnish proofs.⁷ Nor can the company require a certificate from a physician who has not attended the deceased for many years.⁸ The requirements of the policy must, however, be substantially complied with,

¹ *Taylor v. Aetna L. Ins. Co.*, 13 Gray, 434; *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169. See also *Buffalo, etc., Co. v. Knights Templar, etc., Assn.*, 126 N. Y. 450; 27 N. E. R. 942.

² *Buffalo Loan, etc., Co. v. Knights Templar, etc., Assn.*, 126 N. Y. 450; 27 N. E. R. 942; affg. 9 N. Y. Supp. 346.

³ *Potter v. Union Cent. L. Ins. Co.*, 195 Pa. St. 557; 46 Atl. R. 111.

⁴ *Fisher v. Fidelity, etc. Assn.*, 188 Pa. St. 1; 41 Atl. R. 467; *Supreme Lodge, etc. v. Raymond*, 57 Kan. 647; 47 Pac. R. 533; 49 L. R. A. 373.

⁵ *Hart v. Supreme Lodge, etc.*, 108 Wis. 490; 84 N. W. R. 851.

⁶ *Mutual Aid Assn. v. Monti*, 59 N. J. L. 341; 36 Atl. R. 666.

⁷ *Stephenson v. Bankers L. A.*, 108 Ia. 637; 79 N. W. R. 459.

⁸ *Flynn v. Mass. Ben. Assn.*, 152 Mass. 288; 25 N. E. R. 716.

as, for example, where it was agreed in the policy that the company should not be liable for the loss, unless its surgeon-in-chief should be of the opinion that the party whose life was insured did not die from intemperance; it was held that this opinion of the surgeon-in-chief was a condition precedent to recovery and the assured must prove the decision of the surgeon as part of her case, or account for its absence.¹ And so as to other certificates.² The information is the main thing to be regarded in proofs of loss, the form is not important.³ Where only "due proof" is required it does not derogate from the sufficiency of the proofs that they disclose facts of which the insurer can avail himself as a defense to an action on the policy,⁴ nor are such facts disclosed a bar to the bringing of a suit.⁵ Where two or more policies are issued by the same company upon the same life calling for the same kind of proofs, it is enough, in the absence of a requirement to the contrary, to furnish proofs under one policy alone.⁶ Nor is it necessary that the proofs of loss disclose the interest of the insured unless the policy so requires.⁷ A requirement sometimes found in life insurance policies is that among the documents and certificates making up the proofs of death shall be the affidavit of the physician who was the "attending physician," in the last illness of the insured. A physician, not engaged in practice, who is present as a friend and neighbor when a wounded man is brought to his own house, and who

¹ *Campbell v. Am. Popular L. Ins. Co.*, 1 McArthur, 246.

² *Fire Ins. Companies v. Felrath*, 77 Ala. 194.

³ *Irwin v. Springfield, etc., Ins. Co.*, 24 Mo. App. 145.

⁴ *Ins. Co. v. Rodel*, 95 U. S. 237; *Conn. Mut. L. Ins. Co. v. Siegel*, 9 Bush, 450; *Conn. Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593.

⁵ *Ins. Co. v. Rodel*, *supra*; *Life Ins. Co. v. Francisco*, 17 Wall. 672.

⁶ *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Dakin v. Liverpool, etc., Ins. Co.*, 13 Hun, 122; 77 N. Y. 600.

⁷ *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith, 268.

at the request of another neighbor, examines the wounds and administers an opiate is not necessarily such an attending physician. At most it is a question for the jury.¹ And so with the question as to which one of several was the attending physician within the meaning of the policy.² Where a physician unjustly refuses to furnish proofs of death so that proof cannot be made within a limited time the company cannot take advantage of the delay.³

§ 408. **To Whom and at What Place Proofs Must be Furnished.**—If the policy requires that proofs of loss be furnished at a certain place, or to a designated official, this condition must be complied with. An allegation that the proofs were delivered to the company, satisfies a requirement in the policy that they be given to the secretary.⁴ If the contract provides that the insured, in case of loss, shall “deliver in” a particular account, etc., it is not sufficient to mail such account to the company, it must be shown that such account, etc., was received.⁵ Delivery to an authorized agent is sufficient.⁶ A condition that “any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company,” is void as applied to a person, *i. e.*, a local agent, upon whose counter-signature the validity of the policy, by its terms, is made to depend.⁷ It is doubtful

¹ *Gibson v. Am. Mut. L. Ins. Co.*, 37 N. Y. 580.

² *Cushman v. United States L. Ins. Co.*, 70 N. Y. 72; *Life Ins. Co. v. Francisco*, 17 Wall. 672.

³ *O'Neil v. Mass. Ben. Assn.*, 18 N. Y. Supp. 22.

⁴ *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84.

⁵ *Hodgkins v. Montgomery, etc., Ins. Co.*, 34 Barb. 213.

⁶ *North British, etc., Ins. Co. v. Crutchfield*, 108 Ind. 518; *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302; 41 N. E. R. 303.

⁷ *Idem.*

whether such a condition, under any circumstances, can be made available as a defense for the company after a loss has happened.¹ An adjuster, sent to adjust the loss, has authority to receive proofs of loss,² or if the company is foreign, proofs may be made to an agent.³ If the policy requires delivery at the office of the company, a delivery to any officer in charge of such office is sufficient,⁴ or to an agent of the insurer at the place of the loss by request of such agent.⁵ Where the policy was conditioned that in case of loss, "immediate notice shall be given in writing to the company at Hartford, stating, etc., with full particulars of the accident and injury, of which direct and affirmative proof shall be furnished within seven months from the happening of the accident," and failure to comply with this requirement was to avoid the policy, it was held that the condition requiring proofs to be furnished to the company, clearly does not require such proofs to be sent to the home office at Hartford.⁶ In a case in Illinois,⁷ the policy required that notice and proofs should be delivered to the company's secretary at the home office. They were served upon an agent in another place. The agent did not object to the service on the ground that it was not made at a proper place, but refused to receive the proofs on the ground that the policy had been canceled. The court held that this refusal was a waiver of the right to insist upon service of the proofs at the home office. Proofs which were sufficient under the policy, as written, are good after it has

¹ *Idem.* *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Partridge v. Commercial F. Ins. Co.*, 17 Hun, 95; *Indiana F. Ins. Co. v. Hartwell*, 100 Ind. 566.

² *Merchants', etc., Ins. Co. v. Vining*, 67 Ga. 661.

³ *Ætna Ins. Co. v. Sparks*, 62 Ga. 187.

⁴ *Edgerly v. Farmers' Ins. Co.*, 48 Ia. 644.

⁵ *Badger v. Phoenix Ins. Co.*, 49 Wis. 396.

⁶ *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13.

⁷ *German Ins. Co. v. Ward*, 90 Ill. 550.

been reformed so as to express the actual intention of the parties.¹

§ 409. **When Company Refuses to Furnish Blank Forms.**—If the company, or society when notified of the death and requested to furnish blank proofs of loss refuses to do so on the ground that the policy is void, or that it is not liable for the loss, such conduct will be held a waiver of proofs and they need not be supplied.² The obligation is not discharged by simply mailing the blank forms.³ And where a by-law of the society provided that “proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or of the nearest lodge to the deceased,” it was held that upon the refusal of the society, on proper application, to furnish the blanks mentioned proofs of death might be made without such blanks and need not bear the lodge seal.⁴ If the delay in furnishing proofs of loss, or giving notice, is in any way attributable to the insurer, or caused by him, it will not be regarded.⁵

¹ *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

² *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Payne v. Mut. Relief Soc.*, 6 N. Y. St. R. 365; 17 Abb. N. C. 53; *Dial v. Valley M. L. Assn.*, 29 S. C. 560; 8 S. E. R. 27; *Evarts v. U. S. Mut. Acc. Assn.*, 16 N. Y. Supp. 27; *Meagher v. Life Assn.*, 20 N. Y. Supp. 247; *Parsons v. Grand Lodge, etc.*, 108 Ia. 6; 78 N. W. R. 676; *McClure v. Supreme Lodge, etc.*, 41 App. Div. 131; 59 N. Y. Supp. 764; *McDonald v. Bankers L. Assn.*, 154 Mo. 618; 55 S. W. R. 999.

³ *Robinson v. N. W. Nat. L. I. Co. (Minn.)*, 100 N. W. R. 226.

⁴ *Gellatly v. Minnesota Odd-Fellows Mut. Ben. Soc.*, 27 Minn. 215; *Ancient Order Pyramids v. Drake*, 66 Kan. 538; 72 Pac. R. 239.

⁵ *Miller v. Hartford F. Ins. Co.*, 70 Ia. 704; 29 N. W. Rep. 411; *Georgia, etc., Ins. Co. v. Kinnier*, 28 Gratt. 88; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Aurora, etc., Ins. Co. v. Kranich*, 36 Mich. 289; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Craigton v. Agricultural Ins. Co.*, 39 Hun. 319.

§ 410. **Effect of Failure to Furnish Proofs.** — If the effect of a failure to furnish proofs of loss in a reasonable time is not declared in the contract, they are in time if furnished before suit is brought.¹ But where the policy provides that the amount shall be payable after “due notice and proof thereof,” no action can be maintained until after the notice is given and the required proof furnished; for the liability of the insurer does not become absolute unless the preliminary proof as required, by the conditions of the policy, is obtained. If no proof is furnished the liability does not attach.² An insurance company cannot, under the Maine statute, be charged as a trustee for loss or damage under the policy by trustee process by the mortgagee of the property damaged until the preliminary proofs of loss required by the policy have been furnished or waived.³

§ 411. **On Receipt of Proofs Insurer Must Point Out Defects, if any Exist, Within a Reasonable Time.** — When notice and proofs of loss are furnished to the insurer, he must within a reasonable time point out the defects, if any, which they contain. As says the Supreme Court of Michigan: ⁴ “The law is well settled that when any defects are found in the proofs of loss, capable of being remedied if intelligently pointed out, a failure by the underwriters to make known the difficulty, or call for the information omitted, when that is the infirmity, within a reasonable time, is deemed to be a waiver, and the rule is believed to be without exception, that the insurer must object season-

¹ *Farmers' Ins. Co. v. Frick*, 2 Cin. L. Bul. 16.

² *Davis v. Davis*, 49 Me. 282; *Jackson v. Southern, etc., Ins. Co.*, 36 Ga. 429; *Leadbetter v. Aetna Ins. Co.*, 13 Me. 265.

³ *Nickerson v. Nickerson*, 80 Me. 100; 12 Atl. Rep. 880.

⁴ *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423. See also *DeVan v. Commercial Trav. Assn.*, 92 Hun, 256; 36 N. Y. Supp. 931; *Standard, etc., Assn. v. Davis*, 59 Kan. 521; 53 Pac. R. 856; *National Mas. Acc. Co. v. Day*, 55 Neb. 127; 75 N. W. R. 576.

ably, if at all. He must act in good faith, openly, frankly and distinctly, and make his objection known within a reasonable time.”¹ What is a reasonable time in which the insurer must point out defects in proofs of loss is a question of fact for the jury. On this point the Supreme Court of Alabama well says:² “What is a reasonable time, being a mixed question of law and fact, must always be submitted to the jury, under appropriate instructions. It must depend largely on attendant circumstances. In this case the distance from the chief agency, the greater distance from the head office, reasonable time to learn all that could be known of the true facts, and to formulate an opinion upon them — each and all of these must be taken into account in prosecuting the inquiry of reasonable time. Like other rules of law, it rests on reason. Insurance companies must not lure their patrons into false security, by which the latter may lose the means and opportunity of remedying defects in their preliminary proof — must not lead them astray by giving notice of one objection, and then relying upon another; nor by a general refusal to pay, retain in reserve, for a surprise on the trial, some defect in the proof, which, perchance, if known might have been remedied. The law expects and exacts candor and good faith, and punishes with adverse presumptions those who fail to

¹ *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *American L. Ins. Co. v. Mahone*, 56 Miss. 180; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Titus v. Glen Falls Ins. Co.*, 81 N. Y. 410; *Timayenis v. Union Mut. L. Ins. Co.*, 21 Fed. Rep. 223; 22 Blatchf. 405; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 10 N. E. Rep. 242; *Findeisen v. Metropole F. Ins. Co.*, 57 Vt. 520; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *McMasters v. Westchester, etc., Ins. Co.*, 25 Wend. 379; *Boynton v. Clinton, etc., Ins. Co.*, 16 Barb. 254; *Blake v. Exchange, etc., Ins. Co.*, 12 Gray, 265; *Bartlett v. Union Mut. Ins. Co.*, 46 Me. 500; *Lycoming F. Ins. Co. v. Dunmore*, 75 Ill. 14. The foregoing are some only of the cases supporting the principle which is so universally admitted that citations are almost useless.

² *Fire Ins. Companies v. Felrath*, 77 Ala. 201.

observe these cardinal virtues.”¹ The company by receiving proofs does not waive defenses on facts unknown to it at the time.² Objections to the proofs are too late if not made until the trial.³

§ 412. **Objections to Proofs must be Specific : Insurer must not Mislead Assured.** — Objections by the insurer to the proofs of loss must be specific. It is too general to say that they are deficient both in form and substance,⁴ or that they do not correspond to printed instructions;⁵ nor can the company remain silent for a long period and then complain in general terms,⁶ nor is it sufficient to merely say that the proofs are “irregular, informal and insufficient.”⁷ Defects not specifically pointed out are waived.⁸ Nor must the company mislead the insured by propositions of compromise on other grounds of alleged violation of conditions,⁹ or by prolonging negotiations until the time to furnish proofs has expired.¹⁰ If payment is withheld on other grounds than defects in the proofs, such defects will not be regarded and cannot be of avail to the insurer.¹¹ In receiving proofs,

¹ *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423.

² *Home Life Ins. Co. v. Myers*, 50 C. C. A. 544; 112 Fed. R. 846.

³ *Swan v. Liverpool, etc., Ins. Co.*, 52 Miss. 704; *Breckenridge v. American Central Ins. Co.*, 87 Mo. 62; *Organ v. Hibernia F. Ins. Co.*, 3 Mo. App. 576; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 10 N. E. Rep. 242; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant's Ch. (Up. Can.) 418. But see *Mason v. Andes Ins. Co.*, 25 Up. Can. C. P. 37; *McManus v. Aetna Ins. Co.*, 6 Allen (N. B.), 314.

⁴ *Myers v. Council Bluffs Ins. Co.*, 72 Ia. 176; 33 N. W. Rep. 453.

⁵ *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535; 1 Atl. Rep. 523.

⁶ *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13.

⁷ *Madsden v. Phoenix Ins. Co.*, 1 S. C. 24.

⁸ *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254; *Hartford Protection F. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Peoria, etc., Ins. Co. v. Lewis*, 18 Ill. 553; *Phoenix Ins. v. Tucker*, 92 Ill. 64. But see *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551.

⁹ *Ben. Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627.

¹⁰ *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

¹¹ *Aetna Ins. Co. v. Shryer*, 86 Ind. 362; *Atlantic Ins. Co. v. Manning*, 3

however, the insurer may place his disclaimer upon any ground he pleases and still, by express declaration to that effect, reserve all objections to a recovery in any form and to the proofs as furnished.¹ And if no word or act has been said or done by the insurer to mislead insured or throw him off his guard mere silence is not enough to sustain the inference of waiver;² and this is particularly the case if proofs have been received at a later time than is provided, for, under such circumstances, the insurer is not precluded from his objections by retaining the proofs and keeping silent.³ But a demand for additional proofs or further information is a waiver of the time requirement.⁴ The company will not be precluded from insisting upon defects in the proofs if at the time of reception it indicated to insured the intention to hold him strictly to the terms of the policy in this respect.⁵

§ 413. **Where Proofs are Unnecessary.** — No proofs of loss are necessary if the company disclaims all liability

Colo. 224; *Hartford F. Ins. Co. v. Smith*, *Id.* 422; *Williamsburg City, etc., Ins. Co. v. Cary*, 83 Ill. 453; *Phoenix Ins. Co. v. Tucker*, 92 *Id.* 64; *Continental Ins. Co. v. Randolph*, 2 Ky. L. Rep. 313; *Planters' Ins. Co. v. Engle*, 52 Md. 468; *Butterworth v. Western Ass. Co.*, 132 Mass. 489; *Am. L. Ins. Co. v. Mahone*, 56 Miss. 180; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108; *Field v. Ins. Co.*, 6 Biss. 121; *Miller v. Alliance, etc., Ins. Co.*, 19 Blatch. 308; 7 Fed. Rep. 649; *Bang v. Farmville, etc., Ins. Co.*, 1 Hughes, 290; *Merchants' Ins. Co. v. Dwyer*, 1 Posey, 441; *Walsh v. Vermont, etc., Ins. Co.*, 54 Vt. 351. See *post*, § 435, *et seq.*

¹ *Citizens' F. Ins. Co. v. Doll*, 35 Md. 89.

² *Mueller v. Southside F. Ins. Co.*, 87 Pa. St. 399; *St. Amand v. La Cie d'Assurance, etc.*, 9 Queb. L. R. 162.

³ *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Lycoming F. Ins. Co.*, 19 Hun, 238; *McDermott v. Lycoming F. Ins. Co.*, 12 Jones & Sp. 221.

⁴ *McElroy v. John Hancock M. L. Ins. Co.*, 88 Md. 137; 41 Atl. R. 112. See also *Metropolitan L. Ins. Co. v. Mitchell*, 175 Ill. 322; 51 N. E. R. 637. See *post*, § 435.

⁵ *Gauche v. London, etc., Ins. Co.*, 4 Woods, 102; 10 Fed. Rep. 347.

under the contract.¹ Probably no rule of insurance is better settled than this, and the reason rests on the old maxims, *Lex non præcipit inutilia quia inutilis labor stultus*, and *Lex neminem cogit ad vana seu inutilia peragenda*. And so, when the insurer declines to pay the loss, and assigns a reason other than want of proofs, as, for example, the non-payment of an assessment, then proofs of loss are excused. This rule also has never been denied.² When the by-laws of a benefit society require the subordinate lodge to furnish prescribed proofs the beneficiary is excused as there is nothing required of him.³ Many other acts and circumstances will be construed to amount to a waiver of proofs

¹ *Marston v. Mass. Mut. L. Ins. Co.*, 59 N. H. 92; *King v. Hekla F. Ins. Co.*, 58 Wis. 508; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696; *Carson v. German Ins. Co.*, 62 Ia. 433; *Phoenix Ins. Co. v. Adams*, 8 Ky. L. Rep. 532; *Aurora F., etc., Ins. Co. v. Kranich*, 36 Mich. 289; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *German-Am. Ins. Co. v. Davidson*, 67 Ga. 11; *Baile v. St. Joseph, etc., Ins. Co.*, 73 Mo. 371; *Kantrener v. Penn. M. L. Ins. Co.*, 5 Mo. App. 581; *Penn. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Crawford Co., etc., Ins. Co. v. Cochran*, 88 Pa. St. 230; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Kansas Prot. Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275; *Lazensky v. Sup. Lodge K. of H.*, 31 Fed. Rep. 592; *Hinnelein v. Supreme Council, etc. (Cal.)*, 33 Pac. R. 1130; *Stepp v. National L. Assn.*, 37 S. C. 417; 16 S. E. R. 134; *Metropolitan, etc., Co. v. Windover*, 137 Ill. 417; 27 N. E. R. 538; *Seely v. Manhattan L. Ins. Co.*, 72 N. H. 49; 55 Atl. R. 425.

² *Carson v. German Ins. Co.*, 62 Ia. 433; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362; *Merchants' etc., Ins., Co. v. Vining*, 68 Ga. 197; *Goodwin v. Mass. Mut. Ins. Co.*, 73 N. Y. 480; *Marston v. Mass. L. Ins. Co.*, 59 N. H. 92; *Prentice v. Knickerbocker L. Ins. Co.*, 77 N. Y. 483; *Grange Mill Co. v. Western Ass. Co.*, [118 Ill. 396; *Boyd v. Cedar Rapids Ins. Co.*, 70 Ia. 325; 30 N. W. Rep. 585; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *West Rockingham M. F. Ins. Co. v. Sheets*, 26 Gratt. 854; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Taylor v. Merchants' Ins. Co.*, 9 How. 390.

³ *Millard v. Supreme Council, etc.*, 81 Cal. 340; 22 Pac. R. 864; *Ander-son v. Supreme Council, etc.*, 135 N. Y. 107; 31 N. E. R. 1092; *Supreme Council Cath. Ben. S. v. Boyle*, 10 Ind. App. 301; 37 N. E. R. 1105.

of loss or of any defects which might, under other conditions, be taken advantage of. This subject will be further treated of in the succeeding chapter.¹

§ 414. **Good Standing.**—The majority of certificates issued by benefit societies contain the condition that the beneficiary shall only be entitled to recover if the deceased at the time of his death was in “good standing” in the order. It therefore often becomes a question of importance to determine what is meant by this expression. The certificate issued to the member is evidence of his good standing and in the absence of proof to the contrary this condition will be presumed to continue. If by reason of his conduct or failure to comply with the regulations or requirements of the society, the member has lost his good standing, the society must show this fact, for *status* once fixed is supposed to continue until the contrary is shown,—the fact is one of defense and is one peculiarly within its knowledge.² It was held in a case in Illinois,³ that the words, good standing, are to be construed in reference to the language of the application and the preceding language of the certificate, and in that particular instance they meant that the member must not only have a good reputation but be of good conduct,—*i. e.*, free from a violation of his pledge of total abstinence. “Good standing in a society,” says the court, “not only implies that a party is a member of the society,

¹ *Post*, §§ 435, 436.

² *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110; *Mulroy v. Sup. Lodge Knights of Honor*, 28 Mo. App. 463; *Ziegler v. Mut. Aid Soc.*, 1 McGloin (La.), 284; *Stewart v. Supreme Council, etc.*, 36 M. A. 319; *Forse v. Supreme Lodge, etc.*, 41 M. A. 106; *Scheufler v. Grand Lodge A. O. U. W.*, 45 Minn. 256; 47 N. W. R. 799; and see also *Ellerbe v. Faust*, 119 Mo. 653; 25 S. W. R. 390.

³ *Royal Templars of Temperance v. Curd*, 111 Ill. 289. See also *Royal Circle, etc., v. Achterath*, 204 Ill. 549; 68 N. E. R. 492; affg. 106 Ill. App. 439; *Supreme Lodge, etc., v. Goldberger*, 72 Ill. App. 320; *National Union v. Thomas*, 10 App. D. C. 277.

but that he has a good reputation therein.” And in this case the court, upon construing the contract, held that there was a pledge upon the part of the member that he would not use any intoxicating liquor; that the violation of this pledge was cause for expulsion or suspension as a member, and it—not the expulsion or suspension but the violation of the pledge—was also a cause for forfeiture of rights and benefits under the certificate. Consequently, if before his death the member had violated his pledge, although he had not been tried or expelled for the offense, he was not in good standing.¹ But if the constitution provides that upon due conviction of the offense or of certain conduct, the member shall be expelled he is in good standing until expulsion,² and generally speaking, moral lapses do not affect good standing, it must be adjudicated by the society unless the laws provide for a self-executing forfeiture.³ Good standing as to death benefits may exist though not as to sick benefits.⁴ A member of an order at the time of his death in arrears for dues and assessments, the time for the collection of which had fully expired, is by reason of these facts not in good standing within the meaning of a benefit certificate requiring the member to be in good standing in the order at the time of his death to entitle the beneficiary to recover.⁵ A member who has taken his

¹ See also *Hogins v. Sup. Council Champions of the Red Cross*, 76 Cal 109; 18 Pac. Rep. 125; *Smith v. Knights Father Matthew*, 36 M. A. 184; *Parliament, etc. v. Marr*, 20 App. D. C. 362; *Supreme Lodge, etc. v. Wilson*, 14 C. C. A. 264; 66 Fed. R. 785; 30 U. S. App. 234.

² *High Court, etc. v. Zak*, 136 Ill. 185; 26 N. E. R. 593; affg. 35 Ill. App. 613.

³ *High Court, etc. v. Zak*, 136 Ill. 185. See also *O'Grady v. Knights of Columbus*, 62 Conn. 223; 25 Atl. R. 111. In this last case *ipso facto* suspension was provided for, but the beneficiary of a member, who paid up, although his suspension had not been removed, was allowed to recover.

⁴ *Emmons v. Hope Lodge*, 1 Marvel's Del. 187; 40 Atl. R. 956.

⁵ *McMurry v. Supreme Lodge K. of H.*, 20 Fed. Rep. 107; *Biskupski*

withdrawal card is not in good standing.¹ Where dues were payable in advance at the first meeting of the lodge in the quarter it was held that the member was in good standing and not in arrears, although he had not paid his dues for the quarter, he dying August 12th, and the quarter commencing on the first of the same month, if no intervening meeting of the lodge was shown.² If the laws of the order provide that members in arrears shall be suspended the standing of such members is not affected until such suspension is regularly made.³ In a case in the Federal court of Illinois, where the certificate contained a condition that the amount should only be paid if the member at the time of his death was in good standing in his lodge, the court said:⁴ "I think this case might be wholly disposed of on the ground that this being a voluntary society, in which the standing of its members and the mode of suspending and reinstating them in their membership was regulated and provided for by the laws of the society, if the records and proceedings of the body show that a member is not in good standing he must be bound by these records and the action of his society in that regard, especially when he has exercised his right of appeal, and the action of which he complains has been affirmed by the appellate tribunal. The society, by its own laws, being made the judge of the standing of its members, such members are bound by its action on that subject, and I feel very clear that the courts ought not to entertain revisionary

v. Popisil, 27 N. Y. Supp. 1018. See also *United, etc., Soc. v. Dinkley* (Ind. App.), 69 N. E. R. 707; *Littleton v. Wells, etc., Counc. (Md.)*, 56 Atl. 798.

¹ *Meyer v. Am. Star Order*, 2 N. Y. St. R. 492.

² *Mills v. Rebstock*, 29 Minn. 380. See also *Weiss v. Tenant*, 21 N. Y. Supp. 253; and *ante*, § 389, Dues.

³ *District Grand Lodge v. Cohn*, 20 Bradw. 335; *Knights of Honor v. Wickser* (Tex.), 12 S. W. R. 175.

⁴ *Hawkshaw v. Supreme Lodge K. of H.*, 29 Fed. Rep. 773.

supervision over the action of such bodies when dealing with their members, except, perhaps, when fraud is charged and proven." But this declaration must be taken with some degree of allowance, for it is to be modified by the further statement that these proceedings of the subordinate lodge must have been regular and the lodge must have acquired jurisdiction. The rule is more correctly stated by Judge Wheeler, of the United States court for the Southern District of New York, in a suit against the same order and involving to a great extent the same question.¹ After referring to certain cases cited by counsel² the judge says: "These cases show clearly that the decisions of such associations, according to their own laws, rules and regulations, which all assent to who become members, are conclusive as to membership and standing, except as they are reviewable within the order under the laws of the order. But none of the cases go so far as to hold that a mere record of a sentence of suspension, without any proceedings whatever to found it upon and not according to the laws of the order is conclusive anywhere. Section two of article twelve of the laws of this order requires that charges preferred against a member shall be read in open lodge, and a copy of them be furnished to him under the seal of the lodge, and that he be cited to appear to answer them. In *Karcher v. Supreme Lodge*,³ the charge was non-payment of an assessment, and the copy furnished was not under the seal of the lodge. The validity of the judgment of suspension was questioned on the ground that the copy was not sufficient, but the court held that such irregularity would not invalidate the judgment,

¹ *Lazenky v. Supreme Lodge K. of H.*, 31 Fed. Rep. 592.

² *Karcher v. Supreme Lodge K. of H.*, 137 Mass. 368; *Anacosta Tribe v. Murback*, 13 Md. 91; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Burt v. Grand Lodge*, 44 Mich. 208; *Woolsey v. Odd-fellows*, 61 Ia. 492; 16 N. W. Rep. 576; *Harrington v. Workingmen's Assn.*, 70 Ga. 340.

³ 137 Mass. 368.

but intimated that it would not be good without any notice.”¹

§ 414a. **Good Standing in a Benefit Association Contingent on Good Standing in some other Organization.**—The contract often provides that the payment of a benefit to the beneficiary of the member shall be conditioned, not only upon his good standing in that organization, but also in some other society. It has been held,² that where a by-law of a society provided that any member expelled from a Masonic Lodge to which he belongs shall forfeit his membership in the society, such membership is forfeited by his being debarred against his will of the privileges of his lodge though not in form expelled therefrom. In this case the by-laws of a benefit association provided that a requisite qualification for membership should be that the applicant be a Mason in good standing. The Masonic Grand Lodge shortly afterward passed a law debarring saloon-keepers from membership and afterward the benefit association, desiring to comply with the spirit and intent of the order of the Grand Lodge, passed a by-law to the effect that if any of its members should become a saloon-keeper he should forfeit his membership and his certificate thereby, *ipso facto*, became null and void. Another by-law or section of a by-law of the benefit association provided that an “expulsion from his lodge (of Masons) shall *ipso facto* work a forfeiture of the membership in this association.” The court in its opinion says: “The manifest intention of this action of the association was to keep in line with the lodges of the State, from which, alone, its members were recruited. After passage of the edict against saloon-keepers by the united lodges of the State, no one pursuing the occupation

¹ See *Mulroy v. Supreme Lodge Knights of Honor*, 28 Mo. App. 463. See *ante*, § 385, and § 309.

² *Ellerbe v. Faust*, 119 Mo. 653; 25 S. W. R. 390; 25 L. R. A. 149.

of a saloon-keeper, whether technically in, or formally expelled from, his lodge, could be received by the association as eligible to membership. It is argued by counsel for appellant that the respondent was not within the purview of the by-law recited by us, for the reason that he was a saloon-keeper before and at the time it was passed, and therefore did not become one after its passage. The by-law must be interpreted so as to meet the abuse or thing prohibited, and to correct it if possible. The intention is manifest to prevent any of its members from pursuing the occupation of saloon-keepers or bar-keepers. Of course, it was not intended to affect the standing of any one who had pursued the occupation of a saloon-keeper, but who, upon passage of the law, discontinued that occupation. I think it was intended to apply to only such as should be or become saloon-keepers after its passage. As the respondent is admitted to have continued to be a saloon-keeper after its passage, he comes within the operation of its provisions, and according to the declared effect of it, lost his membership, *ipso facto*, without any formal action of the association. But irrespective of the by-law against saloon-keepers passed by the association, it would seem that the respondent lost his membership in it by virtue of the action of the lodge to which he belonged debarring him from membership therein, and the by-law of the association which declared that when a member of the association suffered expulsion from the lodge to which he belonged, he thereby, *ipso facto*, ceased to be a member of the association, without any action on its part. It is contended by counsel for appellant that the respondent, although ceasing to be a member of the lodge to which he had belonged, was not formally expelled therefrom, and therefore did not strictly fall within the operation of the by-law which discontinued him as a member of the association, *ipso facto*,

as soon as he was expelled from his lodge. The termination of his membership in his lodge was in substance and effect an expulsion although not such in form. He was, against his will, debarred of all the rights and privileges of membership by the lodge, on account of his being and continuing a saloon-keeper. After this, it is admitted that he took his 'demit.' I do not see what else he could have done. He had no rights in the lodge, and, as a law-abiding citizen, it was his duty to go away." In another case of a somewhat similar nature it was held that a restoration in good faith by a local lodge of masons in conformity with the decision of the district deputy grand master, when made in good faith, will be binding upon the benefit association in which membership was contingent on continued membership in such masonic lodge, and it is immaterial that the restoration of the member's name was not made until after his death.¹ In this case² the court said: "The defendant association contracted with Connelly on the basis that he was a mason, and that he should remain a mason. It would have been easy for the defendant and Connelly to have agreed upon some method by which the question of his being or remaining a mason should be decided so as to be binding upon them both. In the absence of any agreement in what way his membership in some masonic lodge was to be proved, or how his continuing to be a mason in good standing was to be shown, we should naturally infer that these questions were to be decided by the masonic tribunals. There is no other authority by which these questions could be decided. And

¹ *Connelly v. Masonic Mut. Ben. Assn.*, 58 Conn. 552; 20 Atl. 671; 9 L. R. A. 428. Involving somewhat similar principles, is the case of *Clark v. Reis*, 87 Cal. 543; 25 Pac. R. 759; and *Delaney v. Modern Acc. Club (Ia.)*, 97 N. W. R. 91; *Cowan v. N. Y. Caledonian Club*, 46 App. Div. 288; 61 N. Y. Supp. 714.

² *Connelly v. Masonic, etc., supra.*

it appears that this is just what the defendant did. When Connelly applied to become a member of the defendant association, they asked for and received a certificate signed by an officer of Baltic Lodge that he was a mason. They accepted that as conclusive, and admitted him to membership in the association. When Connelly died they asked for a certificate to be signed by the secretary of Baltic Lodge that he continued to be a mason. The forms, of which copies are set forth in the record, indicate that they are such as are used by the defendant in all cases. They did in the case of Connelly precisely what they do in the case of every one of their members. They referred the question of being or not being a mason to the masonic officers themselves. Such a usage shows that it is really a part of the contract made by the defendant with each of its members that masonic questions shall be decided by masonic tribunals. This is a usage by which we think the defendant must be concluded. In the light of this usage and of all the evidence we think the contract between the defendant and Connelly must be construed as though it provided in terms that the question of his being or continuing to be a mason in good standing should be decided by the masonic officers. The decisions of any kind of a voluntary society or association, in admitting members, and in disciplining, suspending or expelling them, are of a quasi-judicial character. In such cases the courts never interfere, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society; whether or not the proceeding was in good faith; and whether or not there was anything in the proceeding in violation of the laws of the land." Good standing may depend upon membership in the Roman Catholic church, and a by-law providing that the ceasing of such church membership shall *ipso facto* forfeit the rights in the society, is reasonable and self-executing

and not unconstitutional.¹ Where good standing in a subordinate lodge of the Knights of Pythias was required as essential to membership in the endowment rank of the same order, and the secretary of the former failed to notify the endowment rank of the loss of good standing of a member, who continued to pay his assessments to such endowment rank, it was held² that good standing in the latter was not lost.

¹ *Barry v. Order Catholic Knights (Wis.)*, 96 N. W. R. 797; *Franta v. Bohemian R. C. Cent. Union*, 164 Mo. 304; 63 S. W. R. 1100; 54 L. R. A. 723; *Mazurkiewicz v. St. Adelbertus, etc., Soc.*, 127 Mich. 145; 86 N. W. R. 543; 54 L. R. A. 727.

² *Supreme Lodge K. P. v. Kalinski*, 163 U. S. 289; *affg.* 57 Fed. R. 348; 6 C. C. A. 373.

CHAPTER XIII.

WAIVER AND ESTOPPEL.

- § 420. Definitions of Waiver and of Estoppel.
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423. Waiver must be Intentional and with Knowledge.
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- 431a. The Same Subject: Estoppel by Custom or Promise of Agent: Payment of Premium after Death of Insured.
432. The Same Subject: Notices of Premium or Assessments.
433. The Same Subject: General Rule.
434. General Rules of the Law of Waiver or Estoppel Apply to Insurance Contracts.
- 434a. Waiver or Estoppel by Acts of Officers of Subordinate Lodges — Waiver by Members.
435. Calling for Proofs of Loss Waives Breach of Conditions.
436. Other Acts of Insurer in Regard to Proofs of Loss Amounting to Waiver of Particular Requirements.
437. When Insurer is Precluded from Certain Defenses.

§ 420. Definitions of Waiver and of Estoppel. — Waiver has been defined to be “ the relinquishment or refusal to

accept of a right.”¹ Estoppel is: “The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.”² “The law of estoppel,” says Bigelow,³ “is the law of rights acquired or fixed in one of three ways, namely, by record, by deed, or by facts *in pais*.” In insurance cases, if an estoppel exists it is generally by matter *in pais*, though a company may become estopped both by deed and by record. Technically an estoppel *in pais* arises from the acts, admissions or conduct of a person by which he designedly induces another to alter his position injuriously to himself. The approved rule laid down by the authorities⁴ is that to constitute an estoppel by conduct, or equitable estoppel, the following elements must be present: 1. There must have been a false representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. Equitable estoppel, or by conduct, is said to have its foundation in fraud, considered in its most general sense; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be tantamount to a fraud upon the person who had subsequently acquired the right.⁵ The doctrine originated in chancery, but is now adopted in

¹ Bouvier Law Dic, tit. Waiver.

² Bouvier Law Dic., tit. Estoppel.

³ Estoppel, p. 1.

⁴ Bigelow on Estoppel, p. 25.

⁵ Bispham Equity, § 282.

courts of law.¹ After treating of estoppels arising out of representations, including therein cases of silence amounting to a representation by way of admission or negation of rights, Mr. Bigelow, in his treatise on estoppel, says:² “There are other estoppels, so called, growing out of conduct of the same nature that cannot be considered cases of representation at all in any legitimate sense of that term. Such are cases in which, by the course of conduct of one party to a contract, entitled to the performance of certain terms or conditions thereof, the other party has been led to believe, as a man of average intelligence, that such performance will not be required, until it has become too late to perform, or until to insist upon performance, would work material injustice. These commonly are cases of waiver; and it appears to be little, if anything, more than giving them another name to call them estoppels. The estoppel, unlike that by misrepresentation, does not rest upon ignorance of the fact by the party entitled to the benefit of it. Frequent illustrations of the estoppel in question are to be found in actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the insured to believe, until too late, that a requirement of the policy, as, *e. g.*, in regard to the proofs of loss or the prompt payment of the premium or of a premium note will not be required. If the assured as a sensible man has really been misled, it would be a fraud upon him to insist upon the term or condition forborne.”

. § 421. **In Insurance Law Waiver and Estoppel much the Same Thing** — It will be seen from an examination of the cases cited in this chapter, as well as from the preceding sections, that if the words waiver and estoppel, as used in insurance cases, are not synonymous terms, the line of

¹ Note to *Duchess of Kingston's Case*, 2 Smith Lead. Cas. 711.

² P. 623.

separation between them is so shadowy and uncertain that it cannot always be distinguished. In his admirable work on Insurance Mr. May says:¹ “The terms, ‘estoppel’ and ‘waiver,’ though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts.” The Supreme Court of Pennsylvania has remarked² that a waiver of a breach of conditions, “never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it.” And Bigelow says:³ “Another kind of estoppel by conduct may arise, to wit, by a party to a contract or transaction inducing the other to act in the belief that the former will *waive* certain rights he might otherwise maintain against the latter. This estoppel does not consist in misrepresentation by the party to be estopped, nor does it require that the opposite party should be ignorant of the facts. Waiver by an underwriter of the terms of an insurance contract is an example.” It has been said⁴ that waiver differs from estoppel in that it depends solely upon the intention of the party against whom it is invoked. We shall not, therefore, in the succeeding pages attempt to distinguish between cases of waiver and those of estoppel, because if attempted it could not always be done. It will be readily seen that the same facts may be construed both to amount to the waiver of a right, otherwise enforceable, and to estop the party from asserting such right as a defense. What name to give to the legal effect of a certain condition of facts often depends upon the point of view from which such facts are regarded.

¹ § 505.

² *Diehl v. Adams, etc., Ins. Co.*, 58 Pa. St. 443.

³ Bigelow on Estoppel, p. 27.

⁴ *Stiepel v. German-Am. M. L. Assn.*, 55 M. A. 224.

§ 422. **Waiver may be Parol Though Required by the Contract to be in Writing.** — A parol waiver of a condition in a policy is good, notwithstanding a provision in such policy that nothing but a written agreement signed by an officer of the company shall have that effect. Such a requirement may be waived by parol, or acts *in pais*.¹

§ 423. **Waiver Must be Intentional and with Knowledge.**—A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule where there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an agreement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show, not only his own understanding, but that the other party had the same understanding.² And the New York Court of Appeals in approving this rule says: ³ “Ordinarily a party should not be held to have waived a

¹ *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Farmers', etc., Ins. Co. v. Gargett*, 42 Mich. 293; *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *Van Allen v. Farmers', etc., Ins. Co.*, 4 Hun, 413; *Lamberton v. Conn. F. Ins. Co.*, 39 Minn. 129; 39 N. W. Rep. 76; *Smith v. Commercial Union Ins. Co.*, 33 Up. Can. Q. B. 69; *Aetna L. Ins. Co. v. Frierson*, 57 C. C. A. 424; 114 Fed. R. 56; *Burdick v. Security, etc., Assn.*, 77 Mo. App. 629; *Gewaltney v. Provident Savings L. Assn.*, 132 N. C. 923; 44 S. E. R. 659; *Aetna L. Ins. Co. v. Fallows (Tenn.)*, 77 S. W. R. 937; *Mut. R. F. Assn. v. Cleveland*, 27 C. C. A. 212; 82 Fed. R. 508; 54 U. S. App. 290; *Mills v. Home Ben. L. Assn.*, 105 Cal. 232; 38 Pac. R. 723.

² *Bennecke v. Insurance Co.*, 105 U. S. 359; *Darnley v. London, Chat-ham & Dover R. Co.*, L. R. 2 H. L. 43.

³ *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541.

forfeiture, in the absence of facts constituting an estoppel, unless he intended to waive it, nor can he be held to have waived it unless he knew of the facts constituting after the forfeiture.”¹ Consequently acts of either party done after the time the other party claims to have been misled, are no ground of estoppel.² Intimations of legal conclusions, either by acts or words, constitute no foundation for an estoppel.³ A secret intention not to waive cannot overbalance positive acts.⁴

§ 424. **No Estoppel when Contract is Illegal, nor when Parties made a Mutual Mistake, nor when Party has not been Misled: Estoppel when Contract is Executed.** — A contract of insurance entered into in violation of law or public policy is simply void and neither party to it is estopped from showing the fact. “Otherwise the public law and policy would be at the mercy of individual interest and caprice.”⁵ There is no estoppel where both parties with equal opportunities or knowledge on the subject made a mistake,⁶ nor when the insured has not acted upon the supposed waiver⁷ nor when the insured has not been prejudiced;⁸

¹ Girard, etc., Ins. Co. v. Hebard, 95 Pa. St. 45; Diehl v. Adams, etc., Ins. Co., 58 Pa. St. 443; Hazard v. Franklin Mut. F. Ins. Co., 7 R. I. 429; Ryan v. Springfield, etc., Ins. Co., 46 Wis. 671; Finch v. Modern Woodmen, 113 Mich. 646; 71 N. W. R. 1104; Hubbard v. Mut. Res. F. L. A., 80 Fed. R. 681.

² Behrens v. Germania F. Ins. Co., 64 Ia. 19.

³ Packard v. Conn. Mut. L. Ins. Co., 9 Mo. App. 469; Brewster v. Striker, 2 N. Y. 19.

⁴ Modern Woodmen v. Lane, 62 Neb. 89; 86 N. W. R. 943.

⁵ In re Comstock, 3 Sawy. 228; Spare v. Home Ins. Co., 8 Sawy. 618; 15 Fed. Rep. 707; Montgomery v. Whitbeck (N. D.), 96 N. W. R. 327. See also Cathcart v. Equitable M. L. A., 111 Ia. 471; 82 N. W. R. 964.

⁶ Johnson v. Conn. F. Ins. Co. (Ky. Ct. App.), 8 Ky. L. Rep. 460; 2 S. W. Rep. 151; Equitable L. Ass. Soc. v. McElroy, 28 C. C. A. 365; 49 U. S. App. 548; 83 Fed. R. 631.

⁷ Andrews v. Aetna L. Ins. Co., 85 N. Y. 335; Henry v. Gilliland, 103 Ind. 177.

⁸ Jewett v. Home Ins. Co., 29 Ia. 562; Security Ins. Co. v. Fay, 22

for, says the Supreme Court of Michigan:¹ “The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it, to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud.” If an association assumes a name which implies a corporate body, exercises corporate powers, performs acts and contracts as a corporation, it will be estopped to deny that it is a corporation and liable as such.² In an action on a certificate, purporting to be signed by the officers of the corporation and sealed with its seal, certifying that the member to whom the certificate was issued “is a member of this order in” a certain lodge, the corporation is estopped by its own deed from showing that at the time of the issue of the certificate the lodge was not fully organized.³ The court says: “Conceding the organization of the Rising Star Lodge to have been defective as claimed, it would have afforded no answer to the action. It had received its charter, and, as a body, was acting under it with the knowledge and sanction of the defendant. This was sufficient to bind the latter.”

§ 425. **Estoppel from Representations.** — An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,—to a present or past state of things. If the representation relate to some thing to be afterwards brought into exist-

Mich. 467; *Meeder v. Provident L. A. Soc.*, 171 Ill. 432; 64 N. E. R. 167.

¹ *Security Ins. Co. v. Fay*, *supra*.

² *Barbaro v. Occidental Grove, etc.*, 4 Mo. App. 429; *United States Ex. Co. v. Bedbury*, 34 Ill. 466; *Stoddard v. Onondaga Ann. Conference*, 12 Barb. 573; *Scheuffler v. Grand Lodge*, 45 Minn. 256; 47 N. W. R. 799.

³ *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625; 14 N. E. R. 42.

ence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made with party complaining. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions parties must provide by stipulation in their agreements when reduced to writing.¹

§ 426. Waiver or Estoppel by Acts of Officers or Agents. — A party always has the option to waive a condi-

¹ *Insurance Co. v. Mowry*, 96 U. S. 544; *Waynsboro Ins. Co. v. Conover*, 98 Pa. St. 384; *White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159.

tion or stipulation made in his own favor. Insurance companies therefore have this right, but as they are corporations they must act, if at all, through agents. The principal managing officers in charge of the business of a company, and acting within the apparent scope of their employment, may waive or dispense with any of the conditions of a policy of insurance, except, perhaps, as we shall see, in the case of a mutual company the powers of whose officers are said to be more limited. The knowledge of the president of a company is that of the company,¹ and where the secretary of an insurance company fills out an application, the company is presumed to waive any statements of fact that are not inserted in the application and not called for.² The assistant secretary has been held to have authority to waive forfeitures.³ And generally the acts of the president and secretary of a company, performed in its office and relating to its business, whether they are written or verbal, whether they make a contract, waive a forfeiture or give consent, bind the company,⁴ otherwise there would be no safety for any person dealing with the company, for it could avoid the acts of its officers or not as it would be to its advantage. But the knowledge of the treasurer and director of a mutual company will not amount to an estoppel in the absence of authority on the part of such officers to waive the requirements of its laws.⁵ The company can also, of course, waive

¹ *Pomeroy v. Rocky Mountain, etc., Ins. Co.*, 9 Colo. 295.

² *Tiefenthal v. Citizens', etc., Ins. Co.*, 53 Mich. 306. See also *Mut. R. F. L. Assn. v. Cleveland, etc.*, 27 C. C. A. 212; 82 Fed. R. 508; 54 U. S. App. 290.

³ *Piedmont, etc., Ins. Co. v. McLean*, 31 Gratt. 517.

⁴ *Dilleber v. Knickerbocker Life Ins. Co.*, 76 N. Y. 567; 7 Daly, 540; *Cotton States Ins. Co. v. Edwards*, 74 Ga. 220; *Mutual Reserve, etc., Assn. v. Cleveland, etc.*, 27 C. C. A. 212; 82 Fed. R. 508; 54 U. S. App. 290.

⁵ *Hook v. Mut. F. Ins. Co.*, 160 Pa. St. 229; 28 Atl. R. 690.

any conditions through its duly authorized agent or a general agent. The question has frequently arisen as to the authority of insurance agents to waive for, or estop, their principals. If the agent is one with limited authority and not authorized, or expressly forbidden, to waive any conditions of the contract, and these instructions and limitations are communicated to the person dealing with such agent, or if by ordinary prudence he could have informed himself of them, the company will not be bound by the agent's acts.¹ A mere local or collecting agent has no power to waive.² The waiver of an unauthorized agent may, however, be ratified by the company.³ If the agent willfully attempts a fraud upon the company, as by writing down false answers in the application, and the person dealing with him connives at the fraud either from negligence or design, the company will not be bound.⁴ But if no limitation upon the power of the agent be brought to the notice of the assured, who acts in good faith, and he is deceived by the acts of the agent acting within the apparent scope of his employment, the company must respond, for it is at fault in hold-

¹ *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Ins. Co. v. Norton*, 96 U. S. 240; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Green v. Lycoming Fire Ins. Co.*, 91 Pa. 387; *Piedmont & Arlington Life Ins. Co. v. Young*, 58 Ala. 476; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; *Porter v. U. S. Life Ins. Co.*, 160 Mass. 183; 35 N. E. R. 678; *Williams v. Maine R. Assn.*, 89 Me. 158; 36 Atl. R. 63; *Lamb v. Prudential Ins. Co.*, 22 App. Div. 552; 48 N. Y. Supp. 123; *Washington L. Ins. Co. v. Berwald* (Tex. C. A.), 72 S. W. R. 436.

² *Bryan v. National L. Ins. Co.*, 21 R. I. 149; 42 Atl. R. 513; *Home Friendly Soc. v. Berry*, 94 Ga. 606; 21 S. E. R. 583; *Ash v. Fidelity M. L. Assn.*, 26 Tex. Civ. A. 501; 63 S. W. 944; *Dunn v. National L. Ins. Co.*, 69 N. H. 224; 39 Atl. R. 1075; *Berliner v. Travelers, etc.*, 121 Cal. 451; 53 Pac. R. 922.

³ *Dial v. Valley Mut. L. Assn.*, 29 S. C. 560; 8 S. E. 27.

⁴ *Ryan v. World Life Ins. Co.*, 41 Conn. 168; *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100; *ante*, § 152. *et seq.*

ing out such agent as its representative.¹ And generally it may be said that the fraud or mistake of a knavish or blundering agent, done within the scope of his powers, will not enable the company to avoid a policy to the injury of assured, who innocently became a party to it, though a stipulation in the policy provides that such agent shall be deemed the agent of the insured, and the statements of the application, signed by the latter, are made warranties by the policy.² The stipulation of a policy, limiting the power of agents to waive its conditions, are not always conclusive upon either the assured or the company, because it is the privilege of the company to change or dispense with the conditions made for its benefit; it may enlarge the powers of its agents or ratify their acts. The question has been said to be not what power the agent actually had, but what power did the company hold him out to the public as possessing.³ If the policy contain no limitations upon the power of the agent to waive any of its conditions, the company will be bound by his acts in that regard.⁴ If the agent mislead an ignorant person as to

¹ *Insurance Co. v. Wilkenson*, 13 Wall. 222; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *New York L. Ins. Co. v. McGowan*, 18 Kan. 300; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Kausal v. Minnesota, etc., Ins. Co.*, 31 Minn. 17; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *American L. Ins. Co. v. Mahone*, 56 *Id.* 180; *Rohrbach v. Aetna Ins. Co.*, 62 N. Y. 613; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 216; *Knox v. Lycoming F. Ins. Co.*, 50 Wis. 671.

² *Eilenberger v. Protective Ins. Co.*, 89 Pa. St. 464; *Smith v. Farmers', etc., Ins. Co.*, 89 Pa. St. 287; *N. Y. Life Ins. Co. v. McGowan*, 18 Kan. 300; *ante*, § 152, *et seq.*; *post*, § 428. But see *U. S. Life Ins. Co. v. Smith*, 34 C. C. A. 506; 92 Fed. R. 503.

³ *Electric L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Willcuts v. N. W. Mut. L. Ins. Co.*, 81 Ind. 300. See also *John Hancock M. L. I. Co. v. Schlink*, 175 Ill. 284; 51 N. E. R. 795; *James v. Mut. R. F. L. Assn.*, 148 M. 1; 46 S. W. R. 978; *Royal Neighbors v. Boman*, 75 Ill. App. 566; *affd.* 177 Ill. 27; 52 N. E. R. 264; *Silk v. Mut. Res. F. L. Assn.*, 159 Pa. St. 625; 28 Atl. R. 445.

⁴ *Silverburg v. Phoenix Ins. Co.*, 67 Cal. 36.

material matters the company cannot profit by the wrong, but will be estopped.¹ A general agent has power, unless specially restricted by limitations and instructions communicated to parties dealing with him, to waive or dispense with any of the conditions of the policy. And the company is liable for all acts done by him in the course of his employment. He may waive conditions either in writing or verbally.² The stipulation in the policy that no agent shall have power to waive the provisions of the policy, does not embrace a general agent.³ A foreign insurance company is chargeable with the knowledge of its general agent concerning the customs of his office and those under him.⁴ Members of mutual companies are chargeable with knowledge of their law and consequently of all the limitations and restrictions upon the powers of the officers and agents contained in such laws. The requirements of the charter of a mutual organization cannot be waived.⁵ The Supreme Court of Indiana has

¹ *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *O'Rourke v. John Hancock M. L. Ins. Co.* (Dist. Ct. N. Y.), 30 N. Y. Supp. 215.

² *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *N. Y. Life Ins. Co. v. McGowan*, 18 Kan. 300; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236; *Equitable L. Ass. Soc. v. Brobst*, 18 Neb. 526; *Mass. Mut. L. Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Goldwater v. Liverpool, etc., Ins. Co.*, 39 Hun, 176; *Campbell v. National L. Ins. Co.*, 24 Up. Can. C. P. 133; *Home L. Ins. Co. v. Pierce*, 65 Ill. 426; *O'Brien v. Union Mut. L. Ins.*, 22 Fed. Rep. 586; *Burdick v. Security L. Assn.*, 77 Mo. App. 629; *Ætna L. Ins. Co. v. Fallows (Tenn.)*, 77 S. W. R. 937; *N. W. M. L. Ins. Co. v. Freeman*, 19 Tex. Civ. A. 632; 47 S. W. R. 1025; *Mut. L. Ins. Co. v. Logan*, 87 Fed. R. 637; 31 C. C. A. 172; 57 U. S. App. 18. But see *Burruss v. National L. Assn.*, 96 Va. 543; 32 S. E. R. 49.

³ *Bankers L. Assn. v. Stapp*, 77 Tex. 517; 14 S. W. R. 168.

⁴ *Phoenix Mut. L. Ins. v. Hinesley*, 75 Ind. 1; *Liverpool, etc., Ins. Co. v. Ende*, 65 Tex. 118; *Sentell v. Oswego, etc., Ins. Co.*, 16 Hun, 516.

⁵ *Brewer v. Chelsea M. F. Ins. Co.*, 14 Gray, 203; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; *Baxter v. Chelsea M. Ins. Co.*, 1 Allen, 294; *Miller v. Hillsborough F. Assn.*, 42 N. J. Eq. 460; *Manufacturers', etc., Ins. Co. v. Gent*, 13 Bradw. 308; *Borgraefe v. Supreme Lodge, etc.*, 22 Mo. App. 127; *Harvey v. La Cie, etc., Ramsay's App. Cas. (Low. Can.)* 378; *Luthe*

said:¹ “Whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which said act shall be done, and declares that if the act be done in the manner prescribed, the contract, or policy of insurance, shall be void, the company cannot waive the performance of such act in the prescribed mode; for performance of any condition of the contract fixed by law, cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance. Thus, in *Couch v. City Fire Ins. Co.*,² where the charter of the insurance company provided that ‘if there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy under the hand of the secretary,’ it was held by the Supreme Court of Connecticut that the insurance company could not waive the performance of the act required by such provision of its charter, in the mode prescribed, and that its consent to double insurance could only be proved by indorsement thereof upon the policy under the hand of the secretary.”³ A distinction is, however, made between matters touching the substance or essence of the contract and those which relate to certain formalities to be observed after a loss, such as the preliminary proofs to be furnished by the insured. As was said by the Supreme Court of Massachusetts:⁴ “It is well set-

v. Farmers, etc., Co., 55 Wis. 543; *Froehly v. N. St. Louis Ins. Co.*, 32 M. A. 312; but see *McDonald v. Supreme C. O. C. F.*, 78 Cal. 49; 20 Pac. R. 41.

¹ *Leonard v. American Ins. Co.*, 97 Ind. 299.

² 38 Conn. 181.

³ *Hackney v. Alleghany Mut. Ins. Co.*, 4 Pa. St. 185; *Evans v. Tri-mountain Ins. Co.*, 9 Allen, 329; *ante*. § 147.

⁴ *Priest v. Citizens' Mut. F. Ins. Co.*, 3 Allen, 602.

tled that, although the by-laws of a mutual fire insurance company provide that in case of loss the assured shall furnish certain preliminary proofs to the officers to entitle him to recover for the loss, yet the officers may in any particular case waive the stipulation; that such waiver may be either express or by implication; and that it may be implied from the fact that in refusing to pay the loss they neglect to state their objections to the preliminary proofs, and place their refusal on other grounds.¹ A waiver of this sort is unlike a waiver of such provisions of the by-laws as relate to the substance of the contract. The officers have no power to dispense with these.² In the second case³ the distinction between these two classes of by-laws is pointed out. It is said that stipulations as to the preliminary proofs do not touch the substance or essence of the contract; but relate only to the form or mode in which the liability of the company shall be ascertained and proved. Besides, such preliminary proof must necessarily be submitted to the officers of the corporation who must pass on its sufficiency, and it therefore comes within the scope of their authority to say whether proof of the loss is sufficient.”⁴ A distinction has been made between the requirements contained in the charter and the same provisions in the by-laws in regard to the authority of the officers of the company to waive compliance therewith. For example, if membership of an association was by its charter limited

¹ *Underhill v. Agawam Ins. Co.*, 6 Cush. 440.

² *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Brewer v. Chelsea Ins. Co.*, 14 Gray, 203; *Froehly v. N. St. L. Ins. Co.*, 32 M. A. 312.

³ *Brewer v. Chelsea Ins. Co.*, *supra*.

⁴ *Behler v. German, etc., Ins. Co.*, 68 Ind. 354; *Westchester, etc., Ins. Co. v. Earle*, 33 Mich. 150; *Jennings v. Metropolitan L. Ins. Co.*, 148 Mass. 61; 18 N. E. R. 601; *Susquehanna M. F. Ins. Co. v. Elkins*, 124 Pa. St. 484; 17 Atl. R. 24; *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358; 19 Atl. R. 386.

to persons not over a certain age, such a provision could not be waived by the officers of the association; but where the charter contained no restrictions as to the age of the members but the by-laws did, then the officers could waive the requirement.¹ It has, however, been held that there can be no waiver as to age.² The tendency of modern authority is to make no distinction between mutual and stock insurance companies in regard to their liability for the acts of their agents.³ The general rule to be deduced from the preceding authorities is that, except when the company is mutual, it may, either by its own acts or those of its duly authorized agents, waive any of the provisions of the policy inserted therein for its benefit; or it may by its own acts, or those of its duly authorized agents, become estopped from claiming the benefit of such provisions. But agents can only waive compliance by the assured with the terms of the contract when they act within the apparent scope of their employment. If any limitations, or restrictions, upon the authority of agents are communicated to the persons dealing with them, acts of such agents not within such limitations will not bind their principals.⁴

§ 426a. **The Same Subject: Cases Illustrative of Conflicting Views.**—In probably no other branch of the law are the cases so conflicting, and the uncertainty as to the application of correct principles greater, than in those where the authority of insurance agents to bind their principals by waiver or estoppel is considered. In the preced-

¹ *Morrison v. Wisconsin Odd-fellows', etc., Co.*, 59 Wis. 169; *ante*, § 147. But see *Mulrey v. Shawmut, etc., Ins. Co.*, 4 Allen, 116.

² *McCoy v. Roman Catholic, etc., Co.*, 152 Mass. 272; 25 N. E. R. 289. But see *Davidson v. Old Peoples', etc., Soc.*, 39 Minn. 303; 39 N. W. R. 803.

³ *Kausal v. Minnesota, etc., Assn.*, 31 Minn. 17; *ante*, § 156.

⁴ See *ante*, § 152, and § 222, *et seq.*

ing section we have referred to many authorities, and we will here give brief extracts further illustrating the attitude of the courts. In the leading case of *Northern Assur. Co. v. Grand View Building Assn.*,¹ the court said: "What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge or consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where the fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance

¹ 183 U. S. 308; 22 Sup. Ct. Rep. 133.

of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.” In other cases a different position has been taken. The Supreme Court of Missouri has said:¹ “But the defendant relies upon the case of *Northern Assurance Co. v. Grand View Building Association*, decided by the Supreme Court of the United States,² and upon a number of like cases in other jurisdictions, and upon the authority of those decisions contends that the Missouri rule is wrong, because every principal — insurance company as well as individual — has a right to limit the power and authority of his agent, and is not bound by any act of the agent in excess of his power. With every possible respect for the courts whose decisions are cited, and, also, for the learning of the able counsel for the defendant in this case, it is only necessary to say that the Missouri rule does not impair the power of a principal to limit the authority of his agent, nor does it bind the principal for the acts of the agent done in excess of the power conferred on the agent. On the contrary, it holds the principal liable just as far, and no further, as he has made himself responsible. It measures the responsibility of the principal for the acts of the agent, not alone by the terms of the original power conferred on the agent, but also by the subsequent power, written or parol,

¹ *Thompson v. Traders' Ins. Co.*, 169 Mo. 12; 68 S. W. R. 889. See also *Orient Ins. Co. v. McKnight*, 197 Ill. 190; 64 N. E. R. 339; *John Hancock Mut. L. Ins. Co. v. Schlink*, 175 Ill. 284; 51 N. E. R. 795.

² 183 U. S. 308; 22 Sup. Ct. Rep. 133.

expressly conferred, or such as is necessarily implied from the conduct of the principal, and of his agent with his knowledge, and from their course of business with third persons, and which conduct and course of business estop the principal from denying the power of the agent to do the particular act relied on, albeit the power to do that act was not conferred, but on the contrary, was expressly denied to the agent by the original contract. In other words, the Missouri cases give full effect to the contractual power of the principal to limit the authority of his agent in the original appointment or at any other time, but those cases also give like effect to all subsequent powers conferred by the principal upon his agent, either expressly, or by implication, or by estoppel, notwithstanding such powers are in conflict with, in derogation of, or in enlargement of, the powers originally conferred. And this rests upon the doctrine that in each instance the principal binds himself — not that the agent binds the principal beyond his power to bind him. The act of the principal limiting the power of the agent is not irrevocable at the will of the principal. As the principal has the freedom to contract to impose the limitations upon the power and authority of the agent in the first place, so also the principal has the freedom to contract to remove, abolish, alter, diminish or increase, the limitations originally imposed upon the power of the agent, and this the principal may do in any manner that in law will be binding upon him, but in every case it is the act of the principal, that the law simply enforces, and not the unauthorized act of an agent done in excess of the authority conferred. The cases relied on by defendant fail to compel conviction or to be accepted as authority in other jurisdictions, because they lose sight of these fundamental principles of law.” It has also been said:¹

¹ Thornton v. Travelers' Ins. Co., 106 Ga. 121; 42 S. E. R. 287.

“ The policy delivered to plaintiff had in it a stipulation that ‘ no agent has power to waive any condition of this policy.’ Even if the evidence offered was sufficient in itself to show a waiver, the agent had no authority to make this waiver in behalf of the company; and when the policy was delivered to the plaintiff with this stipulation appearing in the face thereof, he was put on notice that this waiver by the agent was not binding on the company, and he is precluded from setting up the waiver claimed to have been thus made.”¹ Waiver or estoppel by acts of officers or agents of benefit societies will be hereinafter considered.”²

§ 427. Estoppel in Matters Relating to the Application. — Although the answers of the insured in the application for insurance are untrue, or incomplete, and this fact might, under the terms of the contract, avoid it, the company may by its conduct, or the acts of its duly authorized agents, be held to have waived its right, or be estopped from setting up such right, to have the policy declared void for misrepresentation or breach of warranty. The insurance company, if the assured was not in fault, cannot take advantage of a mistake in the application when committed by its own agent, nor on the other hand can the beneficiaries, suing on the policy, claim that a false statement was made by the assured through his own mistake, inadvertence or ignorance, when such statement is declared by the policy to be a warranty,³ nor if the application is made part of the contract can one who is able to read, and has warranted

¹ *Porter v. Friendly Society*, 114 Ga. 937; 41 S. E. 45; *Cleaver v. Insurance Co.*, 65 Mich. 527; 32 N. W. 660; 8 Am. St. Rep. 908; *Cook v. Insurance Co.*, 84 Mich. 12; 47 N. W. 568.

² *Post*, § 434a.

³ *Ala. Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *National Fraternity v. Karnes*, 24 Tex. Civ. A. 607; 60 S. W. R. 576.

his answers to the questions in such application to be true, be heard in the absence of fraud to say that he was ignorant of its contents.¹ If the answer to a question in the application assumes knowledge of the fact, the assured and those claiming under him will be precluded from alleging want of knowledge on the part of the assured as an excuse for not answering correctly.² If the company chooses to issue a policy without an application, or with an application defective but true as far as it goes, it will be held to have waived the want of the application or its defects.³ After a loss has been adjusted the company is estopped to set up in defense to the claim, breaches of warranties or stipulations in the original policy.⁴ If the company pay the amount due on a wagering policy to the assignee without objecting that it was deceived by false answers in the application such assignee cannot raise the defense in an action against him by the administrator of the assured.⁵ The insurer is estopped from showing that its examining physician was incompetent, or that the recitals of his certificate are false, unless the physician was influenced by fraudulent representations or concealment of material facts.⁶ Or that the recitals of the policy are

¹ *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 280; 2 S. E. Rep. 258; *Hernden v. Triple Alliance*, 45 M. A. 426; *Fennell v. Zimmerman*, 96 Va. 197; 31 S. E. R. 22. But see *Nugent v. Greenfield L. Assn.*, 172 Mass. 278; 52 N. E. R. 440; *Ketchum v. Am. Mut. Acc. Assn.*, 117 Mich. 521; 76 N. W. R. 5; and *ante*, § 222.

² *Hartford L. & A. Ins. Co. v. Gray*, 91 Ill. 159.

³ *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Liberty Hall Assn. v. Housatonic M. F. Ins. Co.*, 7 Gray, 261; *Watts v. Eq. Mut. L. Assn.*, 111 Ia. 90; 82 N. W. R. 441; *Jones v. N. Y. Life Ins. Co.*, 168 Mass. 245; 47 N. E. R. 92; *Weber v. Ancient Order, etc. (Mo. App.)*, 78 S. W. R. 650.

⁴ *Godchaux v. Merchants' M. Ins. Co.*, 34 La. Ann. 235.

⁵ *Hoffman v. Hoke*, 122 Pa. St. 377; 15 Atl. R. 437.

⁶ *Holloman v. Insurance Co.*, 1 Woods, 674. See also *John Hancock M. L. Ins. Co. v. Houpt*, 113 Fed. R. 572; *Leonard v. State M. L. (R. I.)*,

false.¹ And where the company is responsible for a misstatement in the application it is precluded from setting up such error to avoid the policy.² For example, an applicant gave a true answer to a question by the medical examiner, but the latter wrote a different and untruthful answer in his report, but the applicant did not see the answer as written in the report and was ignorant of the fact that it differed from that given by him. Under these circumstances it was held that the company, not the insured, was responsible for the falsehood.³ If the signature to an application be forged the company cannot defend on that ground if it does not offer to return the premiums,⁴ or if when it issued the policy it knew the facts it cannot set up the want of insurable interest.⁵ A retention of the application for sick benefits is a waiver of verification of the physician's certificate.⁶ If, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer and render the omission to answer more fully

51 Atl. R. 1049; *Baltimore Life, etc. v. Howard*, 95 Md. 244; 52 Atl. R. 397.

¹ *Union Cent. L. I. Co. v. Winn*, 87 Ill. App. 257.

² *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun. 430; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Lueders v. Hartford L. & A. Ins. Co.*, 4 McC. 149; 12 Fed. Rep. 465; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; 40 N. W. R. 386; *Temnick v. Metropolitan L. Ins. Co.*, 72 Mich. 388; 40 N. W. R. 469; *Mut. L. Ins. Co. v. Daviess*, 87 Ky. 541; 9 S. W. R. 812.

³ *Grattan v. Metropolitan L. Ins. Co.*, *supra*; *Keystone Mut. Ben. Assn. v. Jones*, 72 Md. 363; 20 Atl. 195; *Continental L. Ins. Co. v. Thoena*, 26 Ill. App. 495; *Providence Life, etc., Soc. v. Reutlinger*, 58 Ark. 528; 25 S. W. R. 835; *Mut. Res. F. L. A. v. Farmer*, 65 Ark. 581; 47 S. W. R. 850; *ante*, § 223.

⁴ *Home M. R. Assn. v. Riel* (Pa. St.), 17 Atl. R. 36.

⁵ *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45; 27 S. W. R. 286; *Barnes v. London, etc., Co.*, 8 Times L. R. 143.

⁶ *Stambler v. Order Pente*, 159 Pa. St. 492; 28 Atl. R. 301.

immaterial.¹ And if, when the insurance company issues the policy, it knows that certain questions in the application are falsely answered, it waives the right to object by such issue.² But knowledge of one false statement is not a waiver of another false statement which was not known to be untrue.³ But where the manager of an insurance company, having doubts as to the propriety of accepting a certain risk caused the local agent of the company to make other inquiries concerning applicant's habits, and receiving satisfactory reports issued the policy, it was held⁴ that the company was not estopped from relying upon the written application and showing that it contained willfully false statements, the effect of which, under the stipulations of the contract, avoided it. To what extent the company is bound to avail itself of means of knowledge of the falsity of answers in a former application is a somewhat unsettled question. In a Wisconsin case⁵ the Supreme Court of

¹ *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183; *Conn. Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Liberty Hall Assn. v. Housatonic M. F. Ins. Co.*, 7 Gray, 261; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584; 44 N. J. L. 210; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; 36 Am. Rep. 676; *Lebanon M. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Lorillard F. Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Am. Life Ins. Co. v. Mahone*, 56 Miss. 180; *Manhattan L. Ins. Co. v. Willis*, 8 C. C. A. 594; 61 Fed. R. 236; *ante*, § 204.

² *Schwarzbach v. Protective Union*, 25 W. Va. 622; *Gray v. National Ben. Assn.*, 111 Ind. 531; 11 N. E. R. 477; *Mut. R. F. L. A. v. Sullivan* (Tex. Civ. A.), 29 S. W. R. 190; *Koenig v. United L. Ins. Co.*, 38 N. Y. Supp. 506.

³ *Bayley v. Employers, etc., Co. (Cal.)*, 56 Pac. R. 638; *Triple Link, etc. v. Williams*, 121 Ala. 138; 26 Sou. R. 19; *O'Rourke v. Jno. Hancock Mut. L. Ins. Co.*, 23 R. I. 457; 57 L. R. A. 496; 50 Atl. R. 834; *Moore v. Mut. R. F. L. Assn.* (Mich.), 95 N. W. R. 573.

⁴ *Russell v. Canada L. Assn. Co.*, 32 Up. Can. C. P. 256; 8 Ont. App. 716.

⁵ *Morrison v. Wisconsin Odd-fellows' Mut. L. Ins. Co.*, 59 Wis. 162; see also *Lanigan v. Provident Ins. Co.*, 18 N. Y. Supp. 287; *Eastman v. Provident M. R. Assn.*, 65 N. H. 176; 18 Atl. R. 745; *Lindsey v. Mut. Aid Soc.*, 84 Ia. 734; 50 N. W. R. 29; and where a former application was

that State held that where an insurance company has in its possession abundant evidence of a misrepresentation in an application for insurance, it is its duty to examine such evidence, and it is chargeable with notice of the misrepresentation. And if, after such notice, it fails to cancel the insurance and continues to make assessments upon the assured, it "waives the right to cancel. But the Supreme Court of Michigan has held¹ that when a second application is presented to the company it is not obliged to take notice of the answers to the same questions in the first application, which would have shown that the answers in the second application were untrue. If the company, or society, with knowledge that certain answers in the application are false, receives premiums or assessments upon the policy, it will be estopped from setting up as a defense in an action on the policy, or certificate, the falsity of such answers. All of what we have said in this section has general application and applies to benefit societies as well as insurance companies, as far as the facts may be similar.² The reasons for the rule are so obvious as to not need recital; to hold any other way would be to connive at fraud and make bad faith immaterial. After being informed of the falsity of answers in the application a

refused, *Mutual L. Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. R. 910; 26 S. W. R. 998.

¹ *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 32 N. W. Rep. 610. To the contrary *Mut. L. Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. R. 910.

² *Ball v. Granite State M. Aid Assn.*, 64 N. H. 291; 9 Atl. Rep. 103; *Appleton v. Insurance Co.*, 59 N. H. 541; *Insurance Co. v. Wolff*, 95 U. S. 326; *Morrison v. Wisconsin Odd-Fellows' M. L. I. Co.*, 59 Wis. 162; *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622; *Watson v. Centennial M. L. Assn.*, 21 Fed. Rep. 698; *Excelsior M. Aid Assn. v. Riddle*, 91 Ind. 84; *Masonic M. Aid Assn. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Hoffman v. Sup. Council Am. Leg. of Honor*, 35 Fed. R. 252.

company is entitled to reasonable time for investigation or to cancel the policy.¹

§ 428. **The Same Subject: Knowledge, Mistakes or Fraud of Agents.** — It has frequently been a question to what extent the knowledge, misconduct or errors of agents of insurance companies in matters of applications are binding upon their principals so as to amount to a waiver or estoppel in regard to certain requirements. The subject is complicated by the usual stipulations in the policies that the agents receiving the applications are to be regarded as representatives of the insured and not of the company. This matter has already been considered generally,² and it may now again be said that whenever knowledge of the agent's limited authority is brought home to the applicant he must act accordingly, or, if a copy of the application is annexed to the policy and contains untrue answers, written down so by the agent, although answered correctly by the applicant, then the company is not liable for such misconduct, and there can be no waiver nor estoppel.³ Applicants for insurance policies are bound in good faith and must communicate fully and without reserve all information called for, or that is deemed material by the company. The company consummates the contract on the basis of the responses to the questions. If the agent has fuller information, not written in the answers, it would be his duty to communicate it to his principal. The applicant must be understood as making his overture to the company on the

¹ *Andraveno v. Mut. R. F. L. Ins. Co.*, 38 Fed. R. 806. See, as to construction of Iowa statute relative to medical examiner, *Wood v. Farmers, etc., Assn. (Ia.)*, 95 N. W. R. 226; *Stewart v. Eq. M. L. Ass.*, 110 Ia. 528; 81 N. W. R. 782; *Nelson v. Nederland L. Ins. Co.*, 110 Ia. 600; 81 N. W. R. 807.

² *Ante*, § 159 and § 426.

³ *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168.

faith of the disclosure in his application. If the company, without fault on the part of the assured, is misled by the agent, who takes the preparation of the paper into his own hand and makes mistakes or omissions, the company is estopped, except as stated in the last paragraph, for the fault is not with the insured;¹ and the company has accordingly been held estopped where the agent knew of physical defects and failed to disclose them, the applicant acting in fairness and candor, and this in spite of the stipulations of the policy.² The New York Court of Appeals broadly lays down the same principle that "if the statements in the application, relied upon as breaches of warranty, are inserted by the agent for the insurers without any collusion or fraud upon the part of the insured, the insurer is estopped from setting up their error or falsity as breach of warranty," and says the doctrine is well settled.³

¹ *American Ins. Co. v. Mahone*, 56 Miss. 180; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Mass. Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494; *McCall v. Phoenix M. L. Ins. Co.*, 9 W. Va. 237; *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Coolidge v. Charter Oak L. Ins. Co.*, 1 Mo. App. 109; *Taylor v. Mut. Ben. L. Ins. Co.*, 10 Hun, 52; *McArthur v. Globe Mut. L. Ins. Co.*, 14 Hun, 348; *Western Ass. Co. v. Rector*, 9 Ky. L. Rep. 3; *Stone v. Hawkeye Ins. Co.*, 68 Ia. 737; *Eggleston v. Council Bluffs Ins. Co.*, 65 Ia. 308; *Donnelly v. Ins. Co.*, 70 Ia. 693; 28 N. W. Rep. 607; *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291. See also *Singleton v. Prudential Ins. Co.*, 11 App. Div. 403; 42 N. Y. Supp. 446; *Thornberg v. Farmers', etc., Assn. (Ia.)*, 98 N. W. R. 105; *Gear v. U. S. Life Ins. Co.*, 66 Minn. 91; 68 N. W. R. 731; *Rhode v. Metropolitan L. Ins. Co. (Mich.)*, 93 N. W. R. 1076; *Moore v. Mut. Res. F. L. A. (Mich.)*, 95 N. W. R. 573.

² *Follette v. U. S. Mut. Acc. Assn.*, 110 N. C. 377; 14 S. E. 923; *Newman v. Covenant M. B. Assn.*, 76 Ia. 56; 40 N. W. R. 87; *Herndon v. Triple Alliance*, 45 M. E. 426; *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; 16 Atl. R. 263.

³ *Mowry v. Rosendale*, 74 N. Y. 363; *Baker v. Home L. Ins. Co.*, 64 N. Y. 648; *Maher v. Hibernia Ins. Co.*, 67 Id. 283; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; 3 Keyes, 557; 4 Abb. Ct. App. D. 131; *Eggleston v. Council Bluffs, etc., Ins. Co.*, 65 Ia. 308; *Insurance Co. v. Wilkinson*, 13

§ 429. Estoppel in Matters Relating to the Policy or Certificate. — If the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent, with or without authority, represents that the policy will contain certain stipulations, which are not unlawful, then the policy must contain them or the insured is not bound to accept it. But in such case it is the duty of the insured, when he receives the policy, to promptly examine it, and if it does not contain the stipulations agreed upon to at once notify the company of such fact and of his refusal to accept the policy, or he will be deemed to have waived his right,¹ and so a party setting up an equitable estoppel is himself bound to the exercise of good faith. He must also act promptly, an estoppel must be mutual or reciprocal and unless the party relying on the estoppel shows that he acted on the same he will be held to have waived it.² If a person applying for a ten-year paid-up policy receives one marked in plain terms "ordinary life policy" and pays premiums upon it for ten years, he will be held to have waived his rights to require one conforming to his application and equity will not relieve him from the consequences of his want of diligence.³ Or if, for example, a policy is marked, participating, and after

Wall. 222; *Insurance Co. v. Mahone*, 21 *Id.* 152; *Miller v. Mut. Ben. L. Ins. Co.*, 31 *Ia.* 216; *Sullivan v. Phoenix Ins. Co.*, 34 *Kan.* 170; *Fitzmaurice v. N. Y. Life Ins. Co.*, 84 *Tex.* 61; 19 *S. W. R.* 301; *O'Brien v. Home Ben. Soc.*, 117 *N. Y.* 310; 12 *N. E. R.* 954; *Pudridsky v. K. of H.*, 76 *Mich.* 428; 43 *N. W. R.* 373; *Continental L. Ins. Co. v. Chamberlain*, 132 *U. S.* 304; 10 *S. C. R.* 69; *Mut. Ben. Assn. v. Robinson*, 7 *C. C. A.* 444; 58 *Fed. R.* 723; affirming 54 *Fed. R.* 580; *Emlaw v. Travelers' Ins. Co.*, 108 *Mich.* 554; 66 *N. W. R.* 469.

¹ *American Ins. Co. v. Neiberger*, 74 *Mo.* 167; *New York L. Ins. Co. v. Fletcher*, 117 *U. S.* 519; *Mound City L. Ins. Co. v. Twining*, 19 *Kan.* 349. But see *Palmer v. Hartford Ins. Co.*, 54 *Conn.* 488.

² *Andrews v. Aetna L. Ins. Co.*, 85 *N. Y.* 334; 92 *N. Y.* 596.

³ *Massey v. Cotton States L. Ins. Co.*, 70 *Ga.* 794; *Zallee v. Conn. Mut. L. Ins. Co.*, 12 *Mo. App.* 111.

demand for a paid-up policy, the agent, instead of informing the assured that his policy, was non-participating and hence not, under the rules of the company, entitled to be exchanged for a paid-up policy, or that demand must be made in writing, told him that it was all right and he would attend to it, the company may be estopped from claiming that the demand was not rightly made, and it has been so held.¹ Issue of a policy with knowledge of a false answer in the application is a waiver.² So delivery of a policy with knowledge of a breach of condition is a waiver.³ If the company, without consent of the wife, substitutes for a policy, payable to the wife of insured, one payable to the husband, which policy is afterwards with the consent of the company transferred to a third person, the company is estopped from denying the legal, independent existence of such policy, it having been responsible for its issue and instrumental in inducing innocent third parties to give value for it.⁴ In the case first cited⁵ the court said: "This policy belonged originally, and notwithstanding the change, continued to belong to Mrs. Pilcher. As originally executed, her title thereto appeared affirmatively on the face

¹ *Piedmont, etc., Ins. Co. v. Young*, 58 Ala. 476.

² *Triple Link, etc., Assn. v. Williams*, 121 Ala. 138; 26 Sou. R. 19; *O'Rourke v. Jno. Hancock M. L. Ins. Co.*, 23 R. I. 457; 50 Atl. R. 834; 57 L. R. A. 496.

³ *Ames v. Manhattan L. Ins. Co.*, 52 N. Y. Supp. 759; *Hart v. National Masonic Acc. Assn.*, 105 Ia. 717; 75 N. W. R. 508; *Caruthers v. Kansas M. L. Ins. Co.*, 108 Fed. R. 487; *Globe M. L. Ins. Co. v. Ahern*, 92 Ill. App. 326; *affd.* 191 Ill. 167; 60 N. E. R. 806; *Hilt v. Metropolitan L. Ins. Co.*, 110 Mich. 517; 68 N. W. R. 300; *Aetna L. Ins. Co. v. Frierson*, 51 C. C. A. 424; 114 Fed. R. 56; *Supreme Ruling, etc. v. Crawford (Tex. C. A.)*, 75 S. W. R. 844; *Union Nat. Bk. v. Manhattan L. Ins. Co.*, 52 La. Ann. 36; 26 Sou. R. 800; *Standard L. & A. Ins. Co. v. Holloway*, 24 Ky. L. 1856; 72 S. W. R. 796.

⁴ *Pilcher v. New York L. Ins. Co.*, 33 La. Ann. 322, citing *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294; *Chapin v. Fellowes*, 36 Conn. 132; *Dutton v. Willner*, 52 N. Y. 312.

⁵ *Pilcher v. N. Y. Ins. Co.*, *supra*.

of the instrument. The company, by unlawful collusion with Pilcher, suppressed this original instrument, and issued a new one in lieu thereof, in which it falsely declared that the policy was Pilcher's own, and, therefore, assignable by him. It did this, as the evidence shows, for the express purpose of enabling him, under cover of this apparent title, to raise money on the policy. It accepted his assignment thereof and the subsequent reassignment by his first assignees to a perfectly ignorant and innocent holder, who acted upon the faith of title as represented by the company itself in the body of the instrument and as recognized by the company in all its acts. It collected from this assignee the premiums down to the death of the insured. We accuse the company of no intentional wrong; but, for the purposes of this case it occupies the same position as if it were a deliberate and intentional wrong-doer. It was a party to unlawful acts, and, as every one is presumed to know the law, it is presumed to know that they were unlawful. By its affirmative declaration in the body of the instrument that the policy was Pilcher's while, as is presumed, knowing and unlawfully concealing the fact that it was really his wife's; by its acceptance and recognition of Pilcher's assignment and of the reassignment to the bank; and by the reception from the latter of the premiums, it distinctly authorized and induced the bank to accept and act upon, as true, the state of facts thus represented by itself; and it is now conclusively estopped from denying the truth thereof, and from escaping the performance of those obligations which result in law therefrom.¹ By consenting to an assignment of a policy, the company having knowledge that the assured had become intemperate, it will be estopped from setting up that condition to defeat a recovery.² If the company has

¹ See *Barry v. Brune*, 71 N. Y. 261; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156.

² *Pomeroy v. Rocky Mountain, etc., Co.*, 9 Colo. 295; 12 Pac. R. 153.

for a long period of time, as for example eight years, recognized a person as the beneficiary of a policy, it will be held to be estopped to deny his right to sue in his own name as such beneficiary.¹ And so, where a mutual benefit association voluntarily enters into a contract of insurance upon the life of a member for the benefit of one not expressly authorized or prohibited from becoming a beneficiary, which is not contrary to public policy, and receives all the premiums thereon, it will not be allowed to defeat a recovery on the policy, at the suit of the beneficiary, by claiming that the contract, on the part of the association, is *ultra vires*.² There may be a waiver by delay in rescinding a policy.³ By the issue of a policy the company is estopped from denying its authority to do business in the State.⁴ If an association is consolidated with another a member of the old organization does not waive her rights against the directors for refusing to issue a certificate in the new association by making application for such new certificate to the association.⁵

See also *Union Natl. Bk. v. Manhattan L. Ins. Co.*, 52 La. Ann. 36; 26 Sou. R. 800.

¹ *Continental L. Ins. Co. v. Hamilton*, 41 Ohio St. 274.

² *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121. See also *Davidson v. Old People's M. B. Soc.*, 39 Minn. 303; 39 N. W. R. 803.

³ *Baker v. N. Y. Life Ins. Co.*, 77 Fed. R. 650; *N. Y. L. Ins. Co. v. Baker*, 27 C. C. A. 658; 83 Fed. R. 647; 49 U. S. App. 690.

⁴ *Berry v. Knights Templar, etc., Co.*, 46 Fed. R. 439.

⁵ *Grayson v. Willoughby*, 78 Ia. 83; 42 N. W. R. 591. The following cases consider questions of waiver of conditions relating to delivery of a policy and under what conditions the company will be estopped: *Metropolitan L. Ins. Co. v. Mulleady*, 21 Ky. L. R. 879; 53 S. W. R. 282; *Conn. Ind. Co. v. Grogan*, 21 Ky. L. R. 717; 52 S. W. R. 959; *Grier v. Mut. L. Ins. Co.*, 132 N. C. 542; 44 S. E. R. 28; *Provident Savings L. A. Soc. v. Oliver*, 22 Tex. Civ. A. 8; 53 S. W. R. 594; *Cole v. Union Cent. L. Ins. Co.*, 22 Wash. 26; 60 Pac. 68; 47 L. R. A. 201; *N. W. L. Assn. v. Findley*, 29 Tex. Civ. A. 494; 68 S. W. R. 695; *Mut. L. Ins. Co. v. Sinclair*, 24 Kv. L. R. 1543; 71 S. W. R. 853; *Le Bow v. Washington L. Ins. Co.*, 172 N. Y. 623; 65 N. E. R. 1123.

§ 429a. **When Performance of Condition is Impossible.** — If, at the time of issuance of a policy, the company knew that the performance of a condition subsequent therein contained was impossible, or that such condition was inconsistent with the facts, the company will be deemed to have waived performance of such condition, and is estopped from claiming the benefit of it, if the assured has been guilty of no fault. As, for example, if payment of a premium be required to be made at a time when it cannot possibly be made. The following case is an illustration: The assured on June 5th, 1867, applied to the agent in San Francisco of the defendant, a New York life insurance company, for a policy, on his life and paid the first quarterly premium, for which payment he received a receipt of that date specifying that if the application should be accepted the policy should be in effect from that day, if the application was not accepted the money should be returned. The company issued the policy, but dated it April 5th, instead of June 6th, and made the quarterly premiums payable at its office in New York on the sixth days of April, July, October and January in each year. If the premiums were not paid at these times the policy was to be void. At that time from twenty-three to thirty days were required for the passage from New York to San Francisco. The policy was received by the agent in San Francisco, August 2, 1867, who notified the assured to call and get the policy. The assured was mortally wounded August 21, 1867, and died a few days later, never having paid the quarterly premium due July 6, 1867. In an action on the policy this non-payment was set up by the company as a defense. It was held by the court that, as the company must have known when the policy was issued that the quarterly premium of July 6th could not, by the very nature of things, be paid at its office, or elsewhere, according to the condition of the contract, the performance of the condition was

waived. The further reason for holding a waiver was the supposed intention of the company.¹ So where a premium receipt was sent to a bank for collection and the insured notified of the fact. Afterwards the receipt was withdrawn, so that the premium could not be paid to the bank, and the company thereafter refused to receive it. It was held that the company was estopped to claim a forfeiture.²

§ 429b. **Waiver or Estoppel of Benefit Society in Matters Relating to Application.** — Defects in the organization of a new lodge are waived by the receipt of assessments from the members with knowledge of such defects,³ but where the instituting officer knew of a false statement in the application of a new member in regard to the relationship of the beneficiary, it was held⁴ that his knowledge was not that of the association. But it has been held that a soliciting agent can waive stipulations in the benefit certificate which do not relate to the by-laws. So a misrep-

¹ *Young v. Mut. L. Ins. Co.* (U. S. Cir. Ct. Cal.), 2 Ins. L. J. 289. On appeal to the Supreme Court of the United States this judgment was reversed on the ground that the company by not issuing the policy according to the terms of the application, the times of payment of premium being changed, there was no contract, the minds of the contracting parties never having met. *Ins. Co. v. Young*, 23 Wall. 85. See to the point stated in the text, *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Andes Ins. Co. v. Shipman*, 77 Ill. 189. So where the performance of a condition, to be performed after loss, is impossible, as where notice was to be given within ten days after the accident and the insured died after that time, performance is excused. *Hoffman v. Manufacturers' Acc. Ind. Co.*, 56 M. A. 301.

² *Provident Sav. L. A. Soc. v. Duncan*, 53 C. C. A. 69; 115 Fed. R. 277.

³ *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82; 50 N. W. R. 1022.

⁴ *Supreme Counc. A. L. H. v. Green*, 71 Md. 263; 17 Atl. R. 1048. But see *Supreme Council Cath. Benev. L. v. Boyle*, 10 Ind. App. 301; 37 N. E. R. 1105; and *Seibel v. N. W. Mut. R. Assn.*, 94 Wis. 253; 68 N. W. R. 1009.

⁵ *Supreme Counc., etc. v. Boyle*, *supra*.

resentation as to age is waived by collecting and retaining assessments.¹ Where a railway association deducted the assessment from the pay of a member who had not made formal application it was held that the application was waived.² In a recent case,³ it was held that, where the agent of a mutual accident benefit association incorrectly writes down the answers propounded to an applicant for membership, the society is estopped by his action.⁴ The member may be estopped by acquiescence from denying the legality of a change in the classification of members,⁵ and the father of a member cannot question the legal capacity of a subordinate lodge, designated as beneficiary of such member, to receive as such.⁶ The questions of waiver and estoppel in regard to change of beneficiary or by receipt of premium are discussed in the following sections.⁷

§ 430. **Waiver or Estoppel in Matters Relating to Assignment or Change of Beneficiary.**—Although the assignor of a policy allege in a statement to the company that certain assignments of such policy were obtained from him by fraud, he is not thereby estopped from showing that the assignments were void because of his incapacity, by reason of drunkenness, to make the same.⁸ An assignee under an assignment of life policies, such assignment being abso-

¹ *Weiberg v. Minnesota, etc., Assn. (Minn.)*, 76 N. W. R. 37.

² *Burlington, etc., Assn. v. White*, 41 Neb. 561; 59 N. W. R. 751.

³ *Whitney v. National Masonic Acc. Assn.*, 57 Minn. 472; 59 N. W. R. 943.

⁴ The same rule evidently was applied in *Pudridzky v. Supreme Lodge K. of H.*, 76 Mich. 428; 43 N. W. R. 373.

⁵ *Margut v. United Brethren, etc., Soc.*, 148 Pa. St. 185; 23 Atl. R. 896.

⁶ *Bacon v. Brotherhood, etc.*, 46 Minn. 303; 48 N. W. R. 1127.

⁷ *Post*, §§ 430, *et seq.* As to estoppel of member from changing beneficiary, see *ante*, § 306a.

⁸ *Bursinger v. Bank of Watertown*, 67 Wis. 75.

lute in its terms, is not so far bound to disclose the nature of his claims to a subsequent assignee of the assured, the latter assignment being made subject to the lien of the first assignee for moneys advanced by him on said policies, or otherwise on the account of the assignor, that he will be estopped, in a suit for the distribution of the proceeds of such policies, from showing consideration in support of the first assignment to the full amount of the policies.¹ It is now the settled rule² that a benefit society can waive the formalities prescribed by its laws for the change of beneficiary, so as to make such change valid. For example, in a case in Kentucky³ the laws of the society required the member, if he desired to change the beneficiary in his certificate, to surrender such certificate, with a form on the back of it filled up and signed by him and attested by the recorder of the lodge under its seal, and pay a certain fee. The member in question wrote a letter to the recorder of the lodge, in whose possession the certificate was, expressing his wish for a change of beneficiary, but paid no fee. The supreme lodge, which issued the old certificate, recognized this letter and canceled the old and issued a new certificate as requested, and it was held that the old beneficiary in the first certificate could not set up this informal change as against the society, but that the waiver of the informalities was effectual. This view is opposed by a few authorities to the effect that a benefit society cannot waive the formalities prescribed by its laws for change of beneficiary,

¹ *Dff nbach v. Vogeler*, 61 Md. 370.

² *Manning v. Ancient Order of United Workmen*, 86 Ky. 136; 5 S. W. Rep. 385; *Splawn v. Chew*, 60 Tex. 532; *Titsworth v. Titsworth*, 40 Kan. 571; 20 Pac. R. 213; *Knights of Honor v. Watson*, 64 N. H. 517; 15 Atl. 125; *Martin v. Stubbings*, 126 Ill. 387; 18 N. E. R. 657; *Marsh v. Supreme Council, etc.*, 144 Mass. 512; 21 N. E. R. 1070; *Southern Tier, etc., Assn. v. Laudendbach*, 5 N. Y. Supp. 901; *Supreme Conclave, etc. v. Cappella*, 41 Fed. R. 1; *ante*, § 208.

³ *Manning v. A. O. U. W.*, *supra*.

because they are a part of the contract and further, because they are not waiving their own rights but those which are secured by the contract to the first beneficiary.¹ Where, by the laws of a benefit society, the certificate was only assignable by and with the consent of the association thereon indorsed, and the member had assigned the certificate without such consent of the association, it was held that the association could insist upon this provision of the contract. Further, that the receipt by the association from the assignee, after the death of the assignor, of assessments due on the certificate was not such a waiver on its part, or such a recognition of the rights of the assignee as would entitle him to recover on the certificate, because "the assessments due the association might be paid by any one, and the fact that they were received from a volunteer, or any one else, did not affect the contract."² A society may be estopped by not objecting to irregularities in the change of beneficiary,³ or assignment,⁴ and so the original beneficiary may be estopped from questioning the validity of a change of beneficiary by conduct in leading the new beneficiary to believe that she would acquiesce.⁵

§ 431. Waiver or Estoppel by Receipt of Premium or Assessments.—If the company receives payment of the premium with the knowledge of the breach of the conditions of the policy, it will ordinarily be held to have waived the breach and be estopped from alleging such breach as a

¹ See authorities cited, *ante*, § 307.

² *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111.

³ *Kepler v. Supreme Lodge, etc.*, 45 Hun, 274.

⁴ *McFarland v. Creath*, 35 M. A. 112.

⁵ *Hainer v. Ia. Legion of Honor*, 78 Ia. 245; 43 N. W. R. 185; *Supreme Conclave v. Cappella*, 41 Fed. R. 1. As to estoppel of member from changing beneficiary see *ante*, 306a.

ground of forfeiture.¹ The Supreme Court of Illinois, however, has said: ² “The mere act, however, of receiving or collecting the premium by the insurance company, with knowledge of an existing right of forfeiture, has, so far as we know, never been held to estop the company from setting up such forfeiture, if the assured had no reason fairly to conclude from the acts and declarations of the company, or its agents, that the forfeiture had been or would be waived, when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy, induced by the acts, declarations or silence of the company.” But it seems that good faith would require the company, when it becomes aware of a right of forfeiture, to avail itself of it within a reasonable time, and if, after obtaining such knowledge, it collects a premium, it should be held to have waived the forfeiture. Whether, after receiving assessments upon a benefit certificate, a benefit society in an action thereof after a loss has occurred, can set up the defense of *ultra vires*, or whether it is estopped, is a question of some doubt. It has been held that under such circumstances the society is precluded from its defense.³ Upon grounds of public policy other authorities hold differently.⁴ The receipt of an assessment with

¹ *Mershon v. National Ins. Co.*, 34 Ia. 87; *Viele v. Germania Ins. Co.*, 26 Ia. 55; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Lasher v. Northwestern, etc., Ins. Co.*, 55 How. Pr. 318; *Martin v. New Jersey Ins. Co.*, 44 N. J. L. 273; *Pomeroy v. Rocky Mountain, etc., Ins. Co.*, 9 Colo. 295; *Silk v. Mut. B. Fund, etc., Assn.*, 159 Pa. St. 625; 28 Atl. 445; *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; 16 Atl. R. 263;

² *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329; 10 N. East. Rep. 225.

³ *Matt v. Roman Catholic, etc., Soc.*, 70 Ia. 455; 30 N. W. Rep. 799; *Bloomington M. Ben. Assn. v. Blue*, 120 Ill. 121.

⁴ *American Legion of Honor v. Perry*, 140 Mass. 580; *National M. Aid Soc. v. Lupold*, 101 Pa. St. 111; *Webster v. Buffalo Ins. Co.*, 7 Fed. Rep. 399; 2 McC. 348; *ante*, § 244.

one overdue waives the forfeiture for non-payment;¹ and if the association has been in the habit previously of receiving assessments after they were due, without question, it may be estopped from setting up the defense of forfeiture for non-payment at the specified time.² The mere receipt of arrearages, if something more is to be done, will not amount to waiver of conditions of reinstatement.³ There will be no waiver of forfeiture for non-payment of an assessment by receipt of a subsequent one if such receipt is by mistake,⁴ nor if the company had no knowledge of the breach of condition,⁵ nor, if the custom of the company was to receive overdue premiums only if the insured was in good health and, in fact, the insured at the time of such receipt was not in good health.⁶ There may be a conditional waiver in receiving premium or assessments, as if when an overdue premium is paid, it be stated that it is received on condition that the insured is in health, or if such had been the custom of the company.⁷ While the

¹ *Tobin v. Western Mut. Aid Soc.*, 71 Ia. 261; 33 N. W. Rep. 663; *Rice v. New England M. Aid Soc.*, 146 Mass. 248; 15 N. East. Rep. 624; *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840; *Griesa v. Mass. Ben. Assn.*, 133 N. Y. 619; 30 N. E. R. 1146; *DeFrece v. National L. Assn.*, 136 N. Y. 144; 32 N. E. R. 556; *Painter v. Industrial, etc., Assn.*, 131 Ind. 68; 30 N. E. R. 876; *Elmer v. Life Assn.*, 19 N. Y. Supp. 289; *Perine v. Grand Lodge*, 48 Minn. 82; 50 N. W. R. 1022; 53 N. W. R. 367; *Metropolitan L. I. Co. v. Windover*, 137 Ill. 417; 27 N. E. R. 538.

² *Stylow v. Wisconsin Odd-fellows, etc., Co.*, 69 Wis. 224; 34 N. W. R. 151; *Loughridge v. Ia. Mut., etc., Assn.*, 84 Ia. 141; 50 N. W. R. 568.

³ *Wells v. Independent Order, etc.*, 25 Can. L. J. (N. s.) 209; *McGowan v. Supreme Council*, 28 N. Y. Supp. 177. See also *Frame v. Sovereign Camp, etc.*, 67 Mo. App. 127; *Supreme Lodge, etc. v. Hammert*, 94 Ill. App. 164.

⁴ *Elliott v. Lycoming, etc., Ins. Co.*, 66 Pa. St. 22.

⁵ *Gilbert v. North Am. F. Ins. Co.*, 23 Wend. 43; *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541.

⁶ *Lewis v. Phoenix M. L. Ins. Co.*, 44 Conn. 73.

⁷ *Rockwell v. Mut. L. Ins. Co.*, 27 Wis. 372; 20 Wis. 335; 21 Wis. 548; *Crossman v. Mass. Benev. Assn.*, 143 Mass. 435; *Unsell v. Hartford L. &*

occasional reception of premiums after they were due is evidence from which a waiver of the condition of forfeiture may be found, the favor granted by renewing the policy after one failure to pay at the day stipulated, cannot of itself bind the company to waive a subsequent forfeiture that attached by reason of another failure.¹ Especially if the health of the insured has become impaired.² To make out a case where receipt of overdue premiums can be relied upon to create a usage that will estop the company from claiming a forfeiture for non-payment of assessments, it must be shown not only that premiums were habitually received after they were due, which would be a waiver of those several forfeitures, but also that the insurer intended to waive the future prompt payment of the premiums as one of the conditions of the contract, or that the assured, as a reasonable man, was led to believe by its actions that it had waived this condition.³ Receipt of an assessment is a waiver if there be no other conditions of reinstatement than payment of arrearages,⁴ and the question is of intent and

A. Ins. Co., 32 Fed. Rep. 443; *Ronald v. Mut. Reserve F. L. Assn.*, 132 N. Y. 378; 30 N. E. R. 769; affg. 10 N. Y. Supp. 632; *Lamb v. Prudential Ins. Co.*, 22 App. Div. 552; 48 N. Y. Supp. 123; *Bowlin v. Sovereign Camp*, 82 Minn. 411; 85 N. W. R. 160; *Miles v. Mut. R. F. L. Assn.*, 108 Wis. 421; 84 N. W. R. 159.

¹ *Marston v. Mass. M. Life Ins. Co.*, 59 N. H. 92; *Mutual L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Thompson v. Kuickerbocker L. Ins. Co.*, 2 Woods, 547; 104 U. S. 252; *Reichenbach v. Ellerbe*, 115 Mo. 588; 22 S. W. R. 573.

² *National Mut. Ben. Assn. v. Miller*, 85 Ky. 88; 2 S. W. R. 900.

³ *Crossman v. Mass. Ben. Assn.*, 143 Mass. 435; *Spoeri v. Mass. M. Ben. Assn.*, 39 Fed. R. 752; *Redmond v. Canadian M. A. Assn.*, 18 Ontario App. 290; *Illinois L. Assn. v. Wells*, 200 Ill. 445; 65 N. E. R. 1072; *Jones v. Preferred, etc., Assn.*, 120 Mich. 211; 79 N. W. R. 204; *Andre v. Modern Woodmen (Mo. App.)*, 76 S. W. R. 384; *Pray v. Life Indemnity Co.*, 104 Ia. 114; 73 N. W. R. 485; *Aetna L. Ins. Co. v. Smith*, 31 C. C. A. 575; 88 Fed. R. 440. See also *post*, § 431a.

⁴ *McDonald v. Supreme Counc., etc.*, 78 Cal. 49; 20 Pac. R. 41.

for the jury,¹ and waiver may be inferred from acts indicating the intent.² As by letter demanding payment of an assessment.³ Receipt of assessments in ignorance of the illness of a member will not amount to waiver, if the custom was to receive only in case the member was in good health,⁴ nor where there is fraudulent concealment of material facts,⁵ nor pending proceedings for expulsion.⁶ Continued receipt of assessments with knowledge is waiver of right to object to irregular reinstatement.⁷ If an agent, without authority to waive a forfeiture for non-payment of a premium at maturity, has received the unpaid part of a premium on a forfeited policy, for which he gave an antedated receipt, which premium the company has received, in ignorance of the true circumstances under which it was paid, it will not be estopped from claiming the forfeiture of the money so paid to be tendered back on discovery of the facts.⁸ Receipt of assessments after the death of the member is no waiver,

¹ *Odd-fellows Mut. Aid. Assn. v. Sweetzer*, 117 Ind. 97; 19 N. E. R. 722; *Shay v. National Ben. Assn.*, 7 N. Y. Supp. 287.

² *Menard v. Society, etc.*, 63 Conn. 172; 27 Atl. 1115.

³ *Union Cent. L. Ins. Co. v. Duvall*, 20 Ky. L. R. 441; 46 S. W. R. 518.

⁴ *Gabbutt v. Citizens, etc., Assn.*, 84 Ia. 293; 51 N. W. R. 148; *Leffigwell v. Grand Lodge, etc.*, 86 Ia. 279; 53 N. W. R. 243; *Royal, etc., Soc., v. Scovill (Neb.)*, 92 N. W. R. 206. And see cases cited, *supra*.

⁵ *Supreme Lodge, etc. v. Quinn*, 78 Miss. 525; 29 Sou. R. 826.

⁶ *Preuster v. Supreme Council*, 135 N. Y. 417; 32 N. E. R. 135; affg. 15 N. Y. Supp. 41.

⁷ *Mut. Benefit L. Assn. v. Coats*, 48 Ill. App. 185.

⁸ *Union Mut. L. Ins. Co. v. McMullen*, 24 Ohio St. 67; *Diboll v. Ætna L. Ins. Co.*, 32 La. Ann. 179; *Pomeroy v. Rocky Mountain, etc.*, 9 Colo. 295.

⁹ *Bagley v. A. O. U. W.*, 31 Ill. App. 541; *Brown v. Grand Council, etc.*, 81 Ia. 400; 46 N. W. R. 1086; *Royal, etc., Soc. v. Scoville (Neb.)*, 92 N. W. R. 206; *Morris v. Travelers, etc., Co. (Tex. Civ. A.)*, 43 S. W. R. 898. And where a premium was paid by a friend to a bank on the day of the death of insured a delay of three months in tendering back the amount paid is not unreasonable. *McConnell v. Provident, etc., Soc.*, 34 C. C. A. 663; 92 Fed. R. 769.

nor do mere assurances of the agent not followed by payment of premium, amount to waiver.¹ The company will be estopped from contesting the validity of the policy if, with knowledge of the facts, it has assured the holder that there will not be any question over it and thereby led him to pay the premium,² or if it recognizes, after default, the continued existence of the policy by notifying the assured that he is liable to suspension unless he at once pays;³ and a forfeit may be waived by failure to offer to return the unpaid premium note, as required by the contract, although the company did give the notice of forfeiture under the contract.⁴ It is not practicable to examine in detail the large number of cases where the courts have considered whether or not certain acts on the part of the company, or association, or its agents, have the effect of estoppel against claiming a forfeiture for non-payment of premiums. We give in a note, a reference to the cases not herein-before mentioned.⁵

¹ *Mallory v. Metropolitan L. Ins. Co.*, 97 Mich. 416; 56 N. W. R. 773; *Lantz v. Vermont L. Ins. Co.*, 139 Pa. St. 546; 21 Atl. R. 80.

² *Ferguson v. Mass. Mut. L. Ins. Co.*, 32 Hun, 306; 102 N. Y. 647; *Hoffman v. Supreme Counc.*, 35 Fed. R. 252; *Cotton v. Fidelity, etc., Co.*, 41 Fed. R. 506.

³ *Olmstead v. Farmers' M. F. Ins. Co.*, 50 Mich. 200.

⁴ *Johnson v. Southern M. L. Ins. Co.*, 79 Ky. 403.

⁵ Delivery of the premium receipt is a waiver of cash payment. *Willey v. Fidelity M. A. A.*, 25 C. C. A. 593; 80 Fed. Rep. 497. And there will be a waiver of forfeiture by collecting a premium note. *Union Central L. Ins. Co. v. Jones*, 17 Ind. App. 592; 47 N. E. R. 342. Or by accepting part cash and note for the balance. *New York L. Ins. Co. v. Smith* (Tex. Civ. App.), 44 S. W. R. 680; *Union Central L. Ins. Co. v. Wilkes*, 92 Tex. 468; 49 S. W. R. 1038; reversing 47 S. W. R. 546. Or by collecting a note given for a premium. *Union Central L. Ins. Co. v. Woods*, 11 Ind. App. 335; 37 N. E. R. 180; *Manhattan L. Ins. Co. v. Savage*, 23 Ky. L. R. 483; 63 S. W. R. 278; *Beezley v. Des Moines L. Ass'n*, 100 Ia. 436; 69 N. W. R. 549. And by retaining a partial payment. *Great Western, etc., Ass'n v. Colmar*, 7 Colo. App. 275; 43 Pac. Rep. 159. Or by retention of premiums collected after due. *Williams v. Maine St. R. Ass'n*, 89 Me. 158; 36 Atl. Rep. 63. There will be no waiver or

§ 431a. The Same Subject: Estoppel by Custom or Promise of Agent: Payment of Premium after Death of Insured. — In many cases the company has been held estopped, by its having on former occasions received payment of overdue premiums, from claiming a forfeiture, and also by

estoppel if a member is informed that the receipt is conditional. *Modern Woodmen v. Kline*, 50 Neb. 345; 69 N. W. R. 943; *Bryan v. National L. Ass'n*, 21 R. I. 149; 42 Atl. Rep. 513. But see *Beatty v. Mutual Reserve F. L. Ass'n*, 21 C. C. A. 227; 75 Fed. Rep. 65; 44 U. S. App. 527. In the following cases the facts were held not to show a waiver: *Mallory v. Metropolitan L. Ins. Co.*, 97 Mich. 416; 56 N. W. R. 773; *McGowan v. Supreme Council, etc.*, 76 Hun. 534; 28 N. Y. Supp. 177; *Moore v. Order of Railway Conductors*, 90 Ia. 721; 57 N. W. R. 623; *Bradley v. John Hancock Mut. L. Ins. Co.*, 20 App. Div. 22; 46 N. Y. Supp. 627; *Sullivan v. Conn. Indemnity Co.*, 101 Ga. 809; 29 S. E. R. 41; *Supreme Lodge, etc. v. Oeters*, 95 Va. 610; 29 S. E. R. 322; *Banholzer v. New York L. Ins. Co.*, 74 Minn. 387; 77 N. W. R. 295; *Elder v. Grand Lodge, etc.*, 79 Minn. 468; 82 N. W. R. 987; *Pokrefky v. Detroit, etc., Ass'n*, 131 Mich. 38; 90 N. W. R. 689; *Ætna L. Ins. Co. v. Bradway*, 90 I. I. App. 576; *Fidelity, etc., Ass'n v. Price (Ky.)*, 77 S. W. R. 384; *Rice v. Grand Lodge, etc.*, 103 Ia. 643; 72 N. W. R. 770; *French v. Hartford, etc., Co.*, 169 Mass. 510; 48 N. E. R. 268; *McCoy v. North Western Mut. Relief Assn.*, 92 Wis. 577; 66 N. W. R. 697; 47 L. R. A. 681; *Waterworth v. American Order, etc.*, 164 Mass. 574; 42 N. E. R. 106; *New York L. Ins. Co. v. Scott*, 23 Tex. Civ. App. 541; 57 S. W. R. 677. In the following cases the subject of waiver by sending notice of assessments was considered: *McGowan v. North Western L. of H.*, 98 Ia. 118; 67 N. W. R. 89; *Van Bokkelen v. Massachusetts Ben. Assn.*, 90 Hun. 330; 35 N. Y. Supp. 865; *Tekemeyer v. Supreme Council, etc.*, 4 App. Div. 537; 40 N. Y. Supp. 23; *Smallwood v. Life Ins. Co.*, 133 N. C. 15; 45 S. E. R. 519. In the following cases the facts shown were held to show a waiver: *Germania Life Ins. Co. v. Koehler*, 168 Ill. 293; 48 N. E. R. 297; *Moreland v. Union Central L. Ins. Co.*, 104 Ky. 129; 46 S. W. R. 516; *German-American M. L. Assn. v. Farley*, 102 Ga. 720; 29 S. E. R. 615; *Metropolitan L. Ins. Co. v. Quardt*, 69 Ill. App. 649; *McClure v. Supreme Lodge, etc.*, 41 App. Div. 131; 59 N. Y. Supp. 764; *McCarthy v. Cath. Knights*, 102 Tenn. 345; 52 S. W. R. 142; *Reisz v. Supreme Council, etc.*, 103 Wis. 427; 79 N. W. R. 430; *Johnson v. Massachusetts Ben. Assn.*, 9 Kan. App. 238; 59 Pac. Rep. 669; *Guetzkow v. Michigan Mut. L. Ins. Co.*, 105 Wis. 448; 81 N. W. R. 652; *Modern Woodmen v. Lane*, 62 Neb. 89; 86 N. W. R. 943; *Supreme Lodge v. Davis*, 26 Colo. 252; 58 Pac. Rep. 595; *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263; 80 N. W. R. 6; *Dunn v. Merri-*

a promise, express or implied, to receive the premium after it became due.¹ The acts relied on are usually a promise of an agent or a custom of such agent, set up after the death of the insured as an excuse for the non-payment of a premium. While the rule generally may be, as laid down by the Supreme Court of the United States,² that "any agreement, declaration, or course of action on the part of an insurance company, which leads a party honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will, and ought to, estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract," each case depends upon its own peculiar facts. The question suggests itself whether there ought not to be a distinction drawn

mack, etc., Assn., 68 N. H. 365; 44 Atl. R. 484; *Chicago Guaranty Fund v. Ford*, 104 Tenn. 533; 58 S. W. R. 239; *Union Central L. Ins. Co. v. Berlin*, 41 C. C. A. 592; 101 Fed. R. p. 673; *Bingler v. Mutual Ben. L. Ins. Co.*, 10 Kans. App. 6; 61 Pac. Rep. 673; *Hollowell v. Life Ins. Co.*, 126 N. C. 398; 35 S. E. R. 616; *Frazier v. Home L. Ins. Co.*, 71 Vt. 482; 45 Atl. Rep. 1046; *Supreme Tent, etc. v. Volkert*, 25 Ind. App. 627; 57 N. E. R. 203; *Supreme Council, etc. v. Winter*, 108 Ky. 141; 55 S. W. R. 908; *United Security, etc. v. Bond*, 16 App. D. C. 579; *Thompson v. Travelers' Ins. Co.*, 11 N. D. 274; 91 N. W. R. 75; *Frazier v. Aetna L. Ins. Co.*, 114 Wis. 510; 90 N. W. R. 476; *Bennett v. Union Central L. Ins. Co.*, 203 Ill. 439; 67 N. E. R. 971; reversing 104 Ill. App. 402; *New York Life Ins. Co. v. Warren Dep. Bk. (Ky)*, 75 S. W. R. 234; *Newton v. South Western Mut., etc., Ass'n*, 116 Ia. 311; 90 N. W. R. 73; *Lord v. National Protective Soc.*, 129 Mich. 335; 88 N. W. R. 876; *Menard v. Society, etc.*, 63 Conn. 172; 27 Atl. Rep. 1115; *Easley v. Valley Mut. L. Ass'n*, 91 Va. 161; 21 S. E. R. 235; *Supreme Lodge, etc. v. Kalinski*, 163 U. S. 289; *Railway Passenger, etc., Ass'n v. Tucker*, 157 Ill. 194; 42 N. E. R. 398. As to estoppel of member. *Hand v. Supreme Council, etc.*, 44 App. Div. 484; 60 New York Supp. 808; *Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289; 35 N. E. R. 855. As to estoppel as to beneficiary. *McDonald v. Grand Lodge, etc.*, 21 Ky. L. R. 883; 53 S. W. R. 282.

¹ *Ante*, § 361.

² *Insurance Co. v. Eggleston*, 96 U. S. 572; *Hartford L. & A. Co. v. Unsell*, 144 U. S. 439; 12 S. C. R. 671; affg. 32 Fed. R. 443.

between a promise to receive a premium, made before the premium becomes due and one made afterwards, and whether it is exactly right to construe a course of dealing, by receiving an overdue premium from a living person, to mean that an overdue premium can be paid after the death of the insured, so as to revive the contract, when possibly the insured never contemplated paying. In a recent case¹ the Supreme Court of Pennsylvania discusses this subject with great logical power, and the opinion is so important that it is here given. The court says, Paxson, C. J.: "In order to establish an authority to receive an overdue premium after the death of the insured, one of two things must be shown, viz.: (a) An express authority to do so, conferred upon him by the company; or (b) such a course of dealing on the part of the company, by ratifying or recognizing such acts of the agent, as would justify persons dealing with said company in assuming that he possessed such authority. There is not a word in the testimony to sustain either of these propositions. All that it shows was the receipt of overdue premiums on three occasions. But the insured was in full life and health at the time. The case of the plaintiff, if sustained at all, must rest upon the promise of the agent to receive the premium up to the 9th day of March. This promise, as before observed, the jury have found to be an unconditional one. This I understand to mean that the money would be received as late as the 9th of March, without regard to the health of the insured, or even his death prior to that time. It remains to consider the legal effect of such promise. The first question which logically suggests itself is, what was the legal effect upon the *status* of the policy by the default or failure to pay the premium due on the 19th of February? Did it continue

¹ *Lantz v. Vermont L. Ins. Co.*, 139 Pa. St. 546; 21 Atl. R. 80; 10 L. R. A. 577.

to bind the company and protect the insured thereafter? And, if so, how long did it remain in force? Was it for a week, a month, or a year? I know of no instance in which a policy was held to be in force after such a default, unless in pursuance of a contract made between the company and the insured contemporaneous with the insurance, or during the life of the policy. In *Helm v. Insurance Co.*,¹ the plaintiff offered to prove that it is the custom among insurance companies to receive premiums if tendered at any time within 30 days of the time they fall due, provided the insured is in usual health, and that this is the custom among companies issuing policies stipulating that non-payment of premiums at the day shall be a forfeiture. This offer was rejected by the court below, and the rejection was held to be error, Chief Justice Thompson saying: 'It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer.' The grounds of this decision are obvious. While a custom which has grown into a law may not be heard, as a general rule, to affect the terms of a statute nor a contract to the extent of enlarging or abridging the force of it, yet it may interpret either.² The chief justice gives a number of examples of the application of this principle; among others, the familiar instance of the days of grace on commercial paper. By the custom of merchants, so universal as to have grown into law, such paper is not due until three days after it purports to be due; or rather, the remedy is suspended during that period. It was not alleged that any such custom existed in this case. There was not even an offer to show it, much less proof to support it. Did the fact that the company upon three prior occasions accepted the premium from the insured after maturity, the insured being in good

¹ 61 Pa. St. 107.

² *Rapp v. Palmer*, 3 Watts, 178.

health at the time, continue the policy in force after the default on the 19th of February? I know of no authority for such a proposition, and none has been called to our attention. It was at most a mere personal indulgence, a matter of grace on the part of the company, and all that can be claimed for it is that it may have led the insured to believe that, if he again neglected to pay on the day, the money would be accepted if paid shortly thereafter, provided no change had occurred in his condition of health. The law upon this subject is so clearly stated by Mr. Justice Bradley in *Thompson v. Insurance Co.*,¹ that I need make no apology for quoting it at length: ‘The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff himself calls it, an act of leniency. It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company’s prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured

¹ 104 U. S. 252.

had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise an insurance company could never waive a forfeiture on an occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and to the public.' The consequence of a default in the payment of the premium is defined in the policy itself. It declares that, if not paid on the days named, and in the life-time of the insured, the policy should 'cease and determine.' By this I understand that it is suspended, it ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. This term is often used, and, I think, inaccurately, in such cases; nor is the policy void in the general sense of that term. It is voidable at the election of the company, and that election can be exercised without notice to the assured, for the reason that the policy itself is notice that his rights cease with the non-payment of the premium. As to him it is a dead policy. It is true it may be restored to life by the subsequent payment of the premium, and its acceptance by the company. This, however, is a new contract by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.¹ I do not understand it to be contended that had the assured died between the 19th of February and the 2d of March, there could have been a recovery on this policy. It seems almost a work of supererogation to cite authorities for so plain a proposition, and I will refer to but few, out of an abundance. In *Insurance Co. v.*

¹ *Want v. Blunt*, 12 East, 183.

Rosenberger,¹ which was a case of fire insurance, our Brother Sterrett, after saying that the default suspended the protection of the policy, continued: "Upon the payment of the assessment the policy would have been revived in its full vigor; but it was never paid, or even tendered, until after the fire, and as delinquent policy-holders they had no right to maintain the action without showing that the default was either waived or excused by the company. There is no evidence of waiver, nor do we think there is any evidence to excuse the default. There was considerable testimony showing that great indulgence was extended to delinquent members, and that the company was accustomed to receive assessments long after they were due; but this is entirely consistent with the fact that, while the default continued, the protection of the policy was suspended.' In *Insurance Co v. Rough*,² it was said by Mr. Justice Mercur: 'It is well settled, if a member of a mutual insurance company is in default in the payment of an assessment upon his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default.'³ It is true these were cases of fire insurance companies, but the principle is equally applicable to a case of life insurance. This we think sufficient to show that no recovery could have been had upon this policy had the assured died between the date of the maturity of the premium and the promise of the agent to accept the premium on the 9th of March. Regarding that as a promise to accept the premium even in

¹ 84 Pa. St. 373.

² 97 Pa. St. 415.

³ Citing *Hummel's Appeal*, 78 Pa. St. 320; *Insurance Co. v. Buckley*, 83 Pa. St. 293; *Insurance Co. v. Rosenberger*, 84 Pa. St. 373; *Insurance Co. v. Cochran*, 88 Pa. St. 230.

the case of the previous death of the assured, we are led to inquire, in the first place, what authority had the agent to make such a promise? The condition of the policy is explicit that the premium must be paid 'in the life-time of the insured.' Had the agent the authority to waive this condition? The policy not only declared that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts, or waive forfeitures, but a notice to the same effect was printed on the back of each renewal receipt given to Mr. Lantz. It was not alleged that the president and secretary, acting together or singly, had ever waived this condition in the policy, or that they, or either of them, had given authority to the agent to waive it in this or any other instance. No course of dealing was shown on the part of the company by which the grant of such authority to the agent could be implied. There was not even an attempt to prove that the company or its agent had ever received an overdue premium after the death of the assured. There is nothing within the four corners of this record to show that the agent had authority, express or implied, to waive this condition. What right had the assured to suppose, with this condition in the very front of his policy, that the agent would receive his overdue premium after his death? We are not without authority upon this point. The leading case is *Want v. Blunt*.¹ The following statement of the facts is condensed from the opinion of Lord Ellenborough. The policy provided for the payment of quarterly premiums on March 25th, June 24th, September 29th, and 20th of December during the life of the said W. W. Want, or within such time after those days, respectively, as is or shall be allowed for that purpose by the rules of the said society. It was provided

¹ 12 East, 183.

by the rules of the society that if any member neglected to pay the quarterly premiums for 15 days after the same become due, the policy will be void. This provision was attached to the policy. The quarterly payments were all paid at maturity until the one that came due on December 20th, which was not paid, and Want died on December 25th; and on December 27th, 2 days after his death, but within the 15 days, his executors tendered the payment of the premium, which was refused. The court sustained the refusal, Lord Ellenborough saying, *inter alia*: ‘ This is a contract of assurance, and must be construed according to the meaning of the parties as expressed in the deed or policy. * * * The risk insured against is his death, and the premium is a quarterly payment, to be made by him to the society during his life. The duration of the insurance is so long as he shall continue to make those quarterly payments; but the insurance is not to be void if he pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. * * * The covenant on the defendant to pay the wife’s annuity after Want’s death is: ‘ If Want shall pay, or cause to be paid, the quarterly premium on every quarter day during the life of Want, or within such time after as shall be allowed by the rules of the society for that purpose; ’ in construing which sentence, the expression, ‘ during the life of Want,’ must be understood as applying to and carried on to the latter part of the sentence, and is the same as if the words ‘ during the life ’ had been repeated after the words ‘ within such time after,’ *i. e.*, or ‘ within such time after during the life.’ * * * For these reasons we are of opinion that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy, and that on the true construction of the policy and rules of the society, the insurance could not be continued beyond the

expiration of the quarter, which ended on the 20th of December, by a tender of the premium by his executors after his death, though within fifteen days after the quarter day, so as to include within the policy the period of his death.' In *Simpson v. Insurance Co.*,¹ the words of the policy were: 'Provided he, the said insured, on or before * * * pay or cause to be paid to the defendant the annual premium;' and on this point the court said: 'The policy was to continue, provided he, the insured, paid the premium within the twenty-one days; and this, we think, did not give the executors the right to pay it after his death.' To the same point is *Pritchard v. Society*.² The rule laid down in *Want v. Blunt*, *supra*, appears to have been followed in all subsequent cases where the same point arose. If there has been any departure it has not been called to our attention. If, however, we are wrong in this, if we regard the condition in the policy that the premium must be paid in the lifetime of the insured, as of no effect, or, if effective, that it has been waived, there is another reason why the company was not bound to receive the premium after the death of the assured. I have endeavored to show that by the failure to pay the premium the policy lapsed, or was suspended, on the 19th of February. With the policy in this condition, the plaintiff proved, as already stated, an unconditional promise on the part of the agent of the company to accept the premium up to the 9th of March. In the ordinary case of the payment of an overdue premium, as all the authorities show, the policy does not bind between the default and the payment. The plaintiff claims that this case does not come within the rule; that the promise enlarged the time of payment, precisely as if March 9th had been the period

¹ 2 C. B. (N. S.) 257.

² C. B. (N. S.) 622; *Insurance Co. v. Ruse*, 8 Ga. 534.

stipulated in the policy; and that from the time the promise was made until the time it was to be fulfilled the policy was in full force. But if, as I have at least endeavored to show, the policy did not bind between the default and the promise, what occurred on the 2d day of March to change the situation of the parties and restore this dead policy to life? Was it the payment of the premium? The premium was not paid. Was it a promise to pay it? There was no such promise. There was nothing but the bare promise of the agent to accept the premium if paid by the 9th of March. Had it been paid by the assured prior to that date, and accepted by the company, the policy undoubtedly would have been restored to life. This would result, not by virtue of the promise of the agent, but from the acceptance of the premium as a consideration for the renewal. It would have been a new assurance under the old policy. The mere promise of the agent, made after the default had occurred, to receive the premium up to March 9th, was a *nudum pactum*. It was not a contract because there were no contracting parties. The assured gave nothing, promised nothing. A lapsed policy can only be restored to life, so far as the assured is concerned, by the actual payment and acceptance of the premium, or a contract based upon a sufficient consideration. What consideration did the company receive for carrying this risk from the 19th of February until the 9th of March? Had the insured lived until the latter date, and then refused or neglected to pay his premium, he would have had the benefit of an insurance on his life during said period without paying a dollar of consideration. For, as before stated, he did not give anything, nor did he promise anything. It was optional with him to pay. The company could not have enforced it against him had he declined. There is no provision in the policy which covers such a case. If the insured does not pay, the policy drops, and the contract relation ceases.

*Marvin v. Insurance Co.*¹ is so exactly like the case in hand upon the facts that a reference to it will not be out of place. In that case one Milton B. Marvin had a policy of \$3,000 on his life, payable to his wife in case of his death. The premium due on the 13th of April was unpaid. On the 27th of April, Hinkle, the agent of the company, told the assured that if he paid the premium the next morning, the 28th, he, the agent, would receive the same. Hinkle went to the house of the assured the next day, and there found him lying sick upon his bed, and on being offered the overdue premium by the assured, declined to receive it at that time, because the assured was then sick, but told him to keep the money, and when he got well, he, Hinkle, would receive it, and keep the policy alive. The assured never did recover from his sickness, the premium was not paid, and the company notified the assured that it would hold itself absolved from the contract by reason thereof. The assured died in the following September. Under this state of facts it was held there could be no recovery upon the policy, the court below saying: ‘We think the plaintiff was properly nonsuited. As we understand the law as laid down by the court of last resort in such cases, in order to a valid extension of the time for the payment of a premium upon a life-policy after the time of payment has gone by, there must be some valid consideration for the extension or waiver of the condition of payment, or there must be something said by or on behalf of the insurance company, while the party bound to make the payment has still time and opportunity for so doing, by which the insured is induced to believe the condition is waived, or that strict compliance will not be insisted on. This introduces an element of estoppel in the case. In such a case it would be unjust to allow the insurance company to

¹ 85 N. Y. 282.

repudiate the agreement, and to insist that, because of the non-payment of the premium punctually, which omission had been induced or countenanced by its own act, it should be absolved from the performance of its part of the contract.' This case was affirmed in the court of errors and appeals in an opinion by Finch, J., principally upon the ground that, even if Hinkle was the general agent of the company, he had no authority to waive the condition as to payment, the clause in the policy containing a condition similar in this respect to that in the policy in this case. For this reason the court did not deem it necessary to express an opinion upon the ground upon which the court below rested the case, viz.: the want of consideration for the promise, but said expressly: 'It must not be inferred that we deem the ground of the decision below incorrect.' This case is valuable for the further reason that it shows very clearly the ground of the distinction between a promise to extend the time of payment made before the time of such payment and one made after the default. In the former instance the assured may have relied upon the promise, and allowed the time to slip by, whereas, without such promise, he might have procured the money and paid the premium. Hence the cases hold that the company, having misled the assured to his harm, are estopped from alleging a default because of non-payment on the day. But where a promise is made after the default the assured has not been misled or injured in any manner. He has allowed his policy to lapse by his own neglect. It can only be restored by the consent of the company and he has no reason to suppose that if he dies before the matter is perfected by the payment and acceptance of the premium the company will pay as in the case of a live policy. In nearly every case cited to show the authority of an agent to bind the company, by a promise made after a default to pay the premium, the decision of the court was rested upon the

ground of estoppel, a principle which I do not think has any application to the case in hand. In *Dean v. Insurance Co.*¹ the agreement to extend the time was not only made before the premium became due, but the company had actually received the notes of the assured for the payment of three-fourths of the premium. This not only introduced the element of estoppel, but the notes received constituted a valid consideration for the waiver of punctual payment. In *Homer v. Insurance Co.*,² the agreement extending the time of payment was also made before the premium fell due, and thus the policy-holder was prevented from paying the premium on the day it became due by the terms of the policy. In *Tennant v. Insurance Co.*,³ the credit was extended while the policy was in full force. In *Church v. Insurance Co.*⁴ the dealings were between the assured and the home office, and no question was involved as to the authority of the agent. The court held there was evidence to go to the jury that a credit was intended, inasmuch as it showed a prior dealing with the assured for many years, and that he was in the habit of getting policies without paying for them at the time. In *Insurance Co. v. Norton*,⁵ there is an expression by Mr. Justice Bradley, which indicates that he did not see any difference between a promise to extend the time of the payment of the premium, made before the default, and a promise made after such default. In this case, however, there was not only a promise made to pay, but this was followed up by an actual tender of the premium, and a refusal by the company of such tender. This presents an entirely different state of facts from the case I am discussing, and Mr. Justice Bradley's remarks

¹ 62 N. Y. 642.

² 67 N. Y. 478.

³ 31 Fed. Rep. 322.

⁴ 66 N. Y. 222.

⁵ 96 U. S. 234.

must be taken in connection with the particular facts to which he was referring. In *Insurance Co. v. Eggleston*,¹ the question was whether the assured was excused for not paying his premium at maturity. This clearly appears from the concluding portion of the opinion of Mr. Justice Bradley. It is as follows: 'The insured, residing in the State of Mississippi, had always dealt with the agents of the company located either in his own State, or within some accessible distance. He had originally taken his policy from, and paid his first premium to, such agent, and the company had always, until the last premium became due, given him notice what agent to pay. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office. It had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of the fact, at least such was the finding of the jury from the evidence.' *Insurance Co. v. Doster*² is somewhat similar as to its facts. The assured was entitled to a dividend on the business of the company, which was set apart to the insured in part discharge of his premium. The company failed to notify him of the amount, and it was the cause of the delay in the payment. In *Insurance Co. v. Block*³ the premium had been paid, and the question was whether it had been paid to the proper person. In *Insurance Co. v. Hoover*,⁴ which was the case of a payment of the premium on a fire policy after maturity, there was a course of dealing by which the agent gave the assured a credit in his accounts and became himself the debtor of the company

¹ 96 U. S. 572.

² 106 U. S. 30; 1 Sup. Ct. Rep. 18.

³ 109 Pa. St. 535; 1 Atl. Rep. 523.

⁴ 113 Pa. St. 591; 8 Atl. Rep. 163.

therefor. This clearly appears from the following extract from the opinion of Mr. Justice Sterrett: 'On the trial, evidence was received tending to show that Frederick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him from the persons to whom the policies were issued or not; that he made the persons or firms to whom he delivered policies his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same; and that the bills for premiums were generally rendered some time during the month after the insurance was effected.' I have not, of course, reviewed all the authorities cited; I have considered the most important. To review them all would be to protract this opinion to such a length that no one would probably read it. No Pennsylvania case was cited which is in serious conflict with the views above expressed, nor have I been able to find one after a careful examination of the digests. It is possible I may, in the press of business, have overlooked some such case. We have little leisure to search for cases that are not cited. But I regard the overwhelming weight of authority, both in this State and elsewhere, to be in accord with the principles above stated; moreover, I believe them to be sustained by the sounder reason. Under the circumstances, we think it was error for the learned judge below to charge the jury as follows: 'Therefore, I think the question arises, and it is for you to say in this case, whether this general superintendent, residing here in Philadelphia, with his principal in Ver-

mont, and in a constant habit of doing this very thing, because we find a number of receipts where he did receive the money subsequent to the time fixed, and it is testified to in this case that he certainly agreed to do it, and had done it in the case of Mr. Lantz, his brother, so that, if the rule was to be enforced as it is written, he would have no right to do this thing which he had been in the habit of doing, and that, therefore, it is a question for you to say whether he had any authority; whether the company, having permitted him to do this thing constantly, had not authorized him — the secretary and president had not authorized him — to perform the acts that he was doing.' See first assignment. The 'thing' which the agent had done, and which the company had ratified, was the acceptance in three instances of overdue premiums from the assured, he being in full life at the time. Authority beyond this could not be inferred from any act of the company or its agent. It was not denied — indeed it was expressly admitted — that had the assured tendered the premium during his lifetime, it would have been accepted and the policy reinstated. No inference can be properly drawn from this, however, that the company would receive the premium, after the death of the assured. The learned judge failed to note the difference between the renewal of a lapsed policy by the actual payment and acceptance of the premium and a mere attempt to renew it without any consideration moving from the assured to the company. The one is a completed transaction, and therefore binding; the other is uncompleted, and does not even amount to a contract. The same error runs through the charge." And in a case in Canada in holding that receipt of one or more overdue assessments does not bind the association to continue the custom,¹ the court, through Hagarty,

¹ Redmond v. Canadian M. A. Assn., 18 Ontario App. 335. See also Parker v. Knights, etc., Co. (Neb.), 97 N. W. R. 281.

J., said: "If we are to uphold plaintiff's contention our decision would be of a very far-reaching character, affecting a large number of cases and possibly preventing a very common practice of accepting periodical payments after the appointed period of payment. It would be in fact to sanction the idea that indulgence in one or more cases must bar the insistence on punctuality of future payment." A waiver will result where, in accordance with a custom, certain premiums were reported as in arrears, instead of the policies being reported as lapsed.¹ And often the promise or acts of an agent has been held to estop the company from claiming a forfeiture;² as where he is intrusted with a premium receipt,³ or by a false statement that the premium had been paid.⁴

§ 432. **The Same Subject: Notices of Premium or Assessments.** — The mere sending of assessment notices to members who have been suspended for non-payment of assessments, the same being sent for the purpose of inviting reinstatement, will not of itself amount to a waiver of the forfeiture,⁵ although the contrary has been held

¹ *Blake v. National L. Ins. Co.*, 123 Cal. 470; 56 Pac. R. 101.

² *Knarston v. Manhattan L. Ins. Co.*, 124 Cal. 74; 56 Pac. R. 773; *Jones v. Preferred, etc., Co.*, 120 Mich. 211; 79 N. W. R. 204.

³ *U. S. L. Ins. Co. v. Lesser*, 126 Ala. 568; 28 Sou. R. 646. See also *Sullivan v. Germania L. Ins. Co.*, 15 Mont. 522; 39 Pac. R. 742.

⁴ *Union Cas. Co. v. Bragg*, 63 Kan. 291; 65 Pac. R. 272. Other cases in point are *Eichel v. Supreme Lodge, etc.*, 15 Ind. App. 268; 43 N. E. R. 1014; *Baltimore, etc., Co. v. Howard*, 95 Md. 244; 52 Atl. R. 397; *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658; 65 N. E. R. 15; *Haupt v. Phoenix M. L. Ins. Co.*, 110 Ga. 146; 35 S. E. R. 342; *Ætna L. Ins. Co. v. Hartley*, 24 Ky. L. R. 57; 67 S. W. R. 19; 68 S. W. R. 1081.

⁵ *Mutual Protection L. Ins. Co. v. Laury*, 84 Pa. St. 43; *Schmidt v. Modern Woodmen, etc.*, 84 Wis. 101; 54 N. W. R. 264; *Stiefel v. German Am. M. L. Assn.*, 55 M. A. 224; *Toelle v. Central Verein, etc.*, 97 Wis. 322; 72 N. W. R. 630; *Carlson v. Supreme Counc., etc.*, 115 Cal. 466; 47 Pac. R. 375; 35 L. R. A. 643.

because an intent to waive appeared.¹ Nor will the receipt of many assessments over due, if the member was required at the time of payment of such assessments to furnish certificates of health which were not furnished when the last overdue assessment was received, and the insured was not at the time in health.² And, if the payment be extended as an act of kindness to a certain time, and it is not made within that time, there will be no waiver.³ An estoppel cannot be claimed unless the insured was induced by the company to do or omit to do, an act, which he would not otherwise have done or omitted.⁴ So, where the secretary of a company, in which the husband of the plaintiff held a life policy, wrote him Dec. 7th that certain assessments, which were then overdue and by non-payment of which the policy was forfeited, would be received and the forfeiture waived if remitted immediately. Remittance was not then made but on the 25th of the month the insured was taken sick and on the 31st he died. On the 30th of that month at the request of the insured the remittance was made and printed receipts were returned by the company, each containing the provision that it should be valid only on the condition that the assured was alive and in good health on the day of its date; but on the margin of each receipt the secretary had written the words: "no default." After the company was informed of the death of the insured it returned the money. The court held that because remittance was not made immediately upon the receipt of

¹ *Moore v. Order R. R. Conductors*, 90 Ia. 721; 57 N. W. R. 623; *Murray v. Home Ben. L. Assn.*, 90 Cal. 402; 27 Pac. R. 309; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; 37 Pac. R. 245.

² *Crossman v. Mass. Ben. Assn.*, 143 Mass. 435.

³ *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479; *Servoss v. Western M. Aid Soc.*, 67 Ia. 86.

⁴ *Illinois Masons', etc., Soc. v. Baldwin*, *supra*. See also *Keeler v. N. Y. State Ben. Assn.*, 20 N. Y. Supp. 935; *Meeder v. Prov. Savings L. Soc.*, 58 App. Div. 80; 68 N. Y. Supp. 518.

the letter of Dec. 7th, the offer therein contained to waive the default was at an end.¹ But the insurer will be estopped from setting up non-payment of premiums as a cause of forfeiture if it has been in the habit of giving notice of the amount of the premium and time of payment and without notice ceases to do so;² or if its general agent has waived the prompt payment of the premium;³ or if its agent, acting within the apparent scope of his authority, has received a part of the premium and given time for the balance,⁴ or if he, with knowledge of the company, has received the entire premium after the day.⁵ And where the company requested payment of an assessment without stating any conditions it cannot afterwards insist upon a certificate of good health as a condition of reinstatement.⁶ The company cannot change its course of dealing or custom of giving notice or receiving premiums after the day, without notice to the insured of such change.⁷ Notice to pay at a certain bank is waiver of the requirement that the premium is to be paid at the office of the company.⁸ There are fine distinctions in the cases in regard to duty of the company to give notice of

¹ *Servoss v. Western Mut. Aid. Soc.*, *supra*.

² *Insurance Co. v. Eggleston*, 96 U. S. 572; *ante*, §§ 350, 362.

³ *Marcus v. St. Louis M. L. Ins. Co.*, 68 N. Y. 625; *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; reversing 38 Hun, 425; *Dean v. Ætna L. Ins. Co.*, 62 N. Y. 642; reversing 2 Hun, 358; *Palmer v. Phoenix M. L. Ins. Co.*, 84 N. Y. 63.

⁴ *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 440; *Spitz v. Mut. Ben. L. Assn.*, 25 N. Y. Supp. 469.

⁵ *Froelich v. Atlas L. Ins. Co.*, 47 Mo. 406.

⁶ *True v. Bankers, etc., Assn.*, 78 Wis. 287; 47 N. W. R. 520.

⁷ *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 86 Pa. St. 236; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Mayer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; 29 Am. Rep. 200; *Atty.-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Dilleber v. Knickerbocker Ins. Co.*, 76 N. Y. 567; 7 Daly, 540; *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304; 18 Am. Rep. 34.

⁸ *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.), 26 S. W. R. 280.

the falling due of a premium. Where the amount of the premium and the place of its payment are fixed and certain then the company is not only not bound to give notice, but in fact also will not be bound to continue to give notice, even if it has been in the habit of giving it, unless the custom has continued so long as to justify the insured in relying on it, and he must actually have relied upon such custom and have been misled thereby. But if the amount of the premium is uncertain, because liable to be reduced by dividends, and the company is in the habit of notifying the assured of the amount of these dividends and of the cash payment to be made, then, if it does not give the customary notice, it will be estopped from claiming forfeiture for non-payment of the premium.¹

§ 433. **The Same Subject: General Rule.** — If the company has by its course of conduct, acts or declarations, or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to payment of the premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for forfeiture.² In determining whether there has been a modifi-

¹ *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *ante*, § 360.

² *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; *Fowler v. Metropolitan L. Ins. Co.*, 41 Hun, 357; *Washoe Tool Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613; 7 Hun, 74; *Equitable Ins. Co. v. McCrea*, 8 Lea, 541; *Steele v. St. Louis M. L. Ins. Co.*, 3 Mo. App. 207; *Piedmont & Arlington, etc., Ins. Co. v. Fitzgerald, W. & W. (Tex.)* 784; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Insurance Co. v. Tullidge*, 39 Ohio St. 240; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84; *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473; 34 N. E. R. 289.

cation of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the non-payment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the assured, or by the acts and declarations of his authorized agents, has induced in the mind of the assured an honest belief that the terms and conditions of the policy, declaring a forfeiture in event of non-payment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been induced, and the insured has acted on it, the insurer will be estopped from insisting on the forfeiture.¹ The issue of a certificate after an assessment is in default is a waiver of forfeiture for its non-payment.²

§ 434. **General Rules of the Law of Waiver or Estoppel apply to Insurance Contracts.** — Questions of waiver or estoppel in cases relating to insurance contracts are to be determined by the application of the same rules as in cases upon other contracts. While we have referred to some acts and circumstances under which either a waiver or an estoppel has been held to exist, it is not possible to specify what words or conduct will in every case amount to waiver of the requirements or conditions of the policy, or estop the company from insisting upon them. Each case rests upon its

¹ *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Insurance Co. v. Eggleston*, 96 U. S. 572; *Tripp v. Insurance Co.*, 55 Vt. 100; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Hanley v. Life Association*, 69 Mo. 380; *Southern L. Ins. Co. v. Kempton*, 56 Ga. 339; *Am. L. Ins. Co. v. Green*, 57 Ga. 469; *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; *Goedeke v. Metropolitan L. Ins. Co.*, 30 M. A. 601; *Home Protective Co. v. Avery*, 85 Ala. 348; 5 South. R. 143; *Penn. Mut. L. Ins. Co. v. Keach*, 134 Ill. 583; 26 N. E. R. 106; *DeFreese v. National L. Ins. Co.*, 19 N. Y. Supp. 8; *Andrus v. Fidelity M. A. Assn.*, 168 Mo. 151; 67 S. W. R. 582; *King v. Masonic L. Assn.*, 87 Hun, 591; 34 N. Y. Supp. 563.

² *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

own facts and must be determined by the general rule, applicable to all kinds of contracts, for what might under some circumstances estop the company would not in another case where the facts were only very slightly different. Whether a party has waived a condition in a contract is a mixed question of law and fact, but when the facts are found, it is for the court to say whether or not the company has been estopped from claiming its rights under the policy by reason of what it has done or failed to do.¹

§ 434a. Waiver or Estoppel by Acts of Officers of Subordinate Lodge of Beneficiary Society: Waiver by Members. — We have in the preceding sections² considered the effect of receipt of premium or assessments after breach of condition, or expiration of period limited for payment, and the cases cited are those where fraternal benefit societies as well as life insurance companies were parties. We propose at this time to further consider the powers of subordinate lodges of a fraternal benefit society, or their officers' by their acts to bind the society by way of waiver or estoppel. The cases are conflicting and cannot be reconciled. The Supreme Court of Illinois has said:³ "In associations of this character the relation of the members to the order is necessarily through the subordinate lodges, and, when a forfeiture of the certificate of insurance is insisted upon, it is proper to show that the subordinate lodge, with full knowledge of the alleged cause of forfeiture, continued to treat the insurance as in full force, receiving the member's dues and paying the money over to the supreme lodge. We are unable to see how such societies

¹ *Odd-Fellows' M. A. Society v. Sweetzer*, 117 Ind. 97; 19 N. E. R. 722

² *Ante*, §§ 426, 426a, 431.

³ *Independent Order, etc. v. Schweitzer*, 171 Ill. 325; 49 N. E. R. 506. See also *Coverdale v. Royal Arcanum*, 193 Ill. 91; 61 N. E. R. 915; *Grand Lodge, etc. v. Lachmann*, 199 Ill. 140; 64 N. E. R. 1022; affirming 101 Ill. App. 213.

could be conducted upon any other principle without great injustice to the members.” There are other cases where, because either of custom of the lodge or the knowledge of its officers, the supreme body has been held to be estopped from claiming forfeiture.¹ And the knowledge of a deputy supreme officer has been imputed to such body.² The Supreme Court of Wisconsin has apparently held³ that a local lodge of an organization for mutual aid by the receipt of assessments after the death of a member can bind the society. And in other cases the courts have applied the doctrine of estoppel to benefit societies.⁴ It has, however, been held, and the

¹ *Supreme Lodge, etc. v. Dane*, 26 Colo. 252; 58 Pac. Rep. 595; *Wallace v. Fraternal Mystic, etc.*, 121 Mich. 263; 80 N. W. R. 6; 86 N. W. R. 853; *Modern Woodmen v. Lane*, 62 Neb. 89; 86 N. W. R. 943; *Modern Woodmen v. Coleman (Neb.)*, 86 N. W. R. 641; *Bost v. Supreme Council, etc.*, 87 Minn. 417; 92 N. W. R. 337; *Seehorn v. Supreme Council, etc.*, 95 Mo. App. 233; 68 S. W. R. 949; *Salvail v. Catholic Order, etc.*, 70 N. H. 635; 50 Atl. Rep. 100; *Alexander v. Grand Lodge, etc.*, 119 Ia. 519; 93 N. W. R. 508; *Parliament P. P. v. Marr*, 20 App. D. C. 363; *Callies v. Modern Woodmen*, 98 Mo. App. 521; 72 S. W. R. 713; *Whiteside v. Junior Order, etc.*, 82 Fed. Rep. 275; *Courteney v. St. Louis Police, etc., Assn.* 101 Mo. App. 261; 73 S. W. R. 878; *Grand Lodge, etc. v. Scott (Neb.)*, 97 N. W. R. 637; *Shackelford v. Supreme Council*, 98 Ga. 295; 26 S. E. R. 746; *Williams v. Maine, etc., Assn.*, 89 Me. 158; 36 Atl. Rep. 63; *Supreme Lodge, etc. v. Wellenvoss*, 119 Fed. R. 671.

² *McMahon v. Supreme Tent, etc.*, 151 Mo. 522; 52 S. W. R. 384. But to the contrary is *Loeffler v. Modern Woodmen*, 100 Wis. 79; 75 N. W. R. 1012.

³ *Erdmann v. Mut. Ins. Co., Hermann's Sons*, 44 Wis. 376. See also *Supreme Tribe Ben Hur v. Hall*, 24 Ind. App. 316; 56 N. E. R. 780.

⁴ *Hoffmann v. Supreme Council. A. L. H.*, 35 Fed. R. 252; *McDonald v. Supreme Council O. C. F.*, 78 Cal. 49; 20 Pac. R. 41; *Odd-fellows' M. A. Assn. v. Sweetzer*, 117 Ind. 97; 19 N. E. R. 722; *Millard v. Supreme Council, etc.*, 81 Cal. 340; 22 Pac. R. 864; *Perine v. Grand Lodge, etc.*, 48 Minn. 82; 50 N. W. R. 1022; 53 N. W. R. 367; *Moore v. Order Ry. Co. Conductors, etc.*, 90 Ia. 721; 57 N. W. R. 623; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; 37 Pac. R. 245. See as to estoppel by action of agent, *Whitney v. National Mas. Acc. Assn.*, 57 Minn. 472; 59 N. W. R. 943; *Supreme Council Cath. Benev. L. v. Boyle*, 10 Ind. App. 301; 37 N. E. R. 1105.

weight of authority is in favor of the proposition, that the doctrine of waiver has no application to the acts of a ministerial officer of a subordinate lodge,¹ and that the officers of a mutual insurance organization cannot waive the requirements of its laws.² In a case³ where it was sought to excuse the non-payment of an assessment by proof of a custom of the collecting officer to receive payment after the time fixed by the by-laws, the court said: "An officer of such association cannot waive the requirements of its laws which are essential elements of the contract because he is a special agent and his authority is known to the members dealing with him. The rule we think fairly deducible from all the authorities is that he has no authority to waive any of its laws which relate to the substance of a contract between an individual member and his associates in their associated capacity. Even if the financier of the subordinate lodge is regarded as the agent of defendant he could not bind it beyond the scope of his authority; for, if he could, then it logically results that he has the power to suspend or abrogate the constitution and by-laws of the defendant at his mere will and pleasure, which in the very nature of things could not be allowed. Clearly he is invested with no such extraordinary power." And in another case,⁴ the court

¹ *Borgraefe v. Supreme Lodge, etc.*, 22 M. A. 127; 26 M. A. 218.

² *Miller v. Hillsborough F. Assn.*, 42 N. J. Eq. 458; *Swett v. Citizens' Mut. R. Soc.*, 78 Me. 541; *McCoy v. Roman Catholic, etc., Assn.*, 152 Mass. 272; *Eaton v. Supreme Lodge, etc. (U. S. Cir. Ct. Dist. Ohio)*, 29 N. E. R. 1123; *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101; *Lyon v. Supreme Assembly, etc.*, 153 Mass. 83; 26 N. E. R. 236. See *ante*, §§ 147 and 148; *Chadwick v. Triple Alliance*, 56 M. A. 463; *Levell v. Royal Arcanum*, 30 N. Y. Supp. 205.

³ *Harvey v. Grand Lodge A. O. U. W.*, 50 M. A. 472; and see also *State v. Temperance, etc., Soc.*, 42 M. A. 485; *State v. Grand Lodge, etc.*, 70 Mo. App. 456; *Scheele v. Home State, etc.*, 63 Mo. App. 277.

⁴ *Supreme Lodge, etc. v. Keener*, 6 Tex. Civ. App. 267; 25 S. W. R. 1085.

said: "It is insisted that the appellant is estopped from denying the claim of plaintiff by the acts and omissions of the subordinate lodge of which her husband was a member. To this proposition we cannot give our assent. The failure of the lodge to hold monthly meetings in accordance with the laws and regulations of the order did not relieve Keener from his contract with the supreme lodge to pay his monthly assessments, and being by his own negligence suspended from the order, he cannot avoid the penalty of suspension by pleading the derelictions of his lodge. If this be permitted, then a subordinate lodge, by its unauthorized act, or by its culpable omission of duty, may override and render nugatory the express provisions of the supreme law of the order." One of the most important cases discussing the right of an officer of the subordinate body to bind the superior organization by a custom is *Modern Woodmen of America v. Tevis*,¹ where, after referring to a case in the Supreme Court,² the court said: "Tested by this decision, the clerk of the local camp to which the member, Tevis, belonged, was the agent of the head camp, or of the Modern Woodmen of America, to collect, receive, and remit the benefit assessments to it. But he was its agent to collect, receive and remit them at the time and in the manner prescribed for their payment by the by-laws and at no other times and under no other conditions. Those by-laws provided that delinquent members were *ipso facto* suspended; that their certificates were void; that they could be reinstated by the clerk by the receipt of arrearages only when they were in good health, and when they furnished warranties to that effect; and that no act or omission of the clerk of the local camp could have the effect of creating any liability of the

¹ 54 C. C. A. 293; 117 Fed. Rep. 369.

² *Northern Assurance Co. v. Grand View Bldg. Assn.*, 183 U. S. 308.

society, or of waiving any right or immunity belonging to it. These limitations upon the power of this agent were known to the insured and the beneficiaries named in this certificate, because they were a part of their contract; and, in view of this decision of the Supreme Court to which we have adverted at such length, there is no escape from the conclusion that these limitations were binding upon all parties to the agreement, and that the acts of the clerk of the local camp in extending the times of payment of the assessments upon its members and in reinstating delinquent members without warranties of good health were unauthorized by the society, and, in the absence of knowledge of and acquiescence in them by some of the chief officers of the head camp, were ineffective to establish any estoppel against the society, or any waiver by it of the provisions of the agreement. A principal may limit the authority of his agent, and when he does so the agent cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations of his power. Insurance companies and beneficial associations may limit the authority of their agents in this way by stipulations in their contracts, and, when so limited, such agents cannot by contract, waiver, or estoppel bind their companies to the insured, or to the beneficiaries of the agreements beyond the scope of their authority prescribed therein, because the insured and the beneficiaries are conclusively presumed, in the absence of fraud or mistake, to know the terms of their contracts. The Modern Woodmen of America so limited the power of the local camp by the terms of its benefit certificate in this case that he was without authority to extend the time of payment of benefit assessments to waive defaults in their payment, or to reinstate a delinquent member who was not in good health, or who failed to furnish a warranty thereof. The beneficiaries and the insured knew these

limitations upon the power of this agent, because they were a part of their contract with the society; and the acts of this local clerk beyond the scope of his prescribed authority, in the absence of notice or knowledge of and acquiescence in them by some of the principal officers of the society, constituted no waiver, estoppel, or contract of the association. They were not the acts of the society, and the insured and the beneficiaries were charged with knowledge of that fact.” In other cases this rule is approved.¹ It has also been held that knowledge by an investigating committee of three, appointed by a subordinate lodge, at the time of an application for membership, of false answers in such application will not charge the grand lodge with such knowledge nor estop it from setting up the false answers as a defense to the certificate.² Upon principle it would seem that members of a benefit society being presumed to know its laws, cannot excuse their failure to comply with those laws, on the ground of the omissions or acts of other members, selected for officers, because, as all know the limitations of authority imposed by such by-laws on the officers, the members cannot be misled or claim want of knowledge. It is an elemental rule that where

¹ *Supreme Lodge K. of H. v. Jones* (Ind. App.), 69 N. E. R. 718; *Lavin v. Grand Lodge* (Mo. App.), 78 S. W. R. 325; *Graves v. Modern Woodmen*, 85 Minn. 396; 89 N. W. R. 6; *Voelkel v. Supreme Tent, etc.*, 116 Wis. 202; 92 N. W. R. 1104; *Field v. National Council, etc.*, 64 Neb. 226; 89 N. W. R. 773; *Kocher v. Supreme Council Cath. Ben. L.* 65 N. J. L. 649; 48 Atl. R. p. 544; 52 L. R. A. 861; *Hand v. Supreme Council*, 167 N. Y. 600; 60 N. E. R. 1112, affirming 44 App. Div. 484; 60 N. Y. Supp. 808; *United Moderns v. Pike* (Civ. App.), 76 S. W. R. 774; *Adam v. Grand Lodge, etc.* (Neb.) 92 N. W. R. 588; *Wuerfler v. Trustees, etc.*, 116 Wis. 19; 92 N. W. R. 433; *Boyce v. Royal Circle, etc.*, 99 Mo. App. 349; 73 S. W. R., 300; *Sovereign Camp, etc. v. Rothschild*, 15 Tex. Civ. App. 463; 40 S. W. R. 553; *Supreme Council R. A. v. Taylor*, 57 C. C. A. 406; 121 Fed. Rep. 66; *Rice v. Grand Lodge*, 103 Ia. 643; 72 N. W. R. 770.

² *Levell v. Royal Arcanum* (Super. Ct.), 30 N. Y. Supp. 205.

the means of knowledge are equal there can be no estoppel, nor can estoppel exist without some act of the party estopped misleading the other to his disadvantage. A member by acquiescence may waive the required formalities prescribed for the notice,¹ and an application for reinstatement is a waiver of defects in the notice.² He can waive formalities required for suspension.³ But payment of assessments under protest is no waiver.⁴ An insane member, however, cannot waive any provisions of the contract for his benefit nor bind himself by admissions.⁵ A custom will not avail a member unless it be shown that he knew of it.⁶ Where the by-laws provide that a member in arrears shall not become entitled to benefits by paying up, the acceptance of arrearages is not a waiver of the by-laws.⁷ The payment of an assessment, where it is received conditionally, does not estop the member from questioning its validity.⁸ It has been held⁹ that the action of the subordinate lodge in paying sick benefits to the member and assessments for him cannot estop the

¹ *Stewart v. Supreme Council, etc.*, 36 M. A. 184; *Heffernan v. Supreme Council, etc.*, 40 M. A. 605. See also *Supreme Lodge, etc. v. Andrews* (Ind. App.), 67 N. E. R. 1009; *Allen v. Merrimack, etc., Assn.* (N. H.), 57 Atl. R. 922; *Smith v. Covenant M. B. Assn.*, 16 Tex. C. A. 593; 43 S. W. R. 819; *Hand v. Supreme Council, etc.*, 167 N. Y. 600; 60 N. E. R. 1112; 44 App. Div. 484; 60 N. Y. Supp. 808. And as to mere talk of member not amounting to an estoppel, see *Petherick v. Order, etc.*, 114 Mich. 420; 72 N. W. R. 262.

² *Hansen v. Supreme Lodge, etc.*, 140 Ill. 301; 29 N. E. R. 1121.

³ *Miller v. U. S. Grand Lodge*, 72 Mo. App. 499.

⁴ *Russ v. Supreme Council, etc.*, 110 La. 588; 34 Sou. R. 697; *Supreme Council, etc. v. Champe*, 127 Fed. 541; *Dowling v. Knights, etc.*, 116 Mich. 471; 74 N. W. R. 725.

⁵ *Supreme Lodge v. Zuhlke*, 129 Ill. 298; 21 N. E. R. 788; *Hoefner v. Grand Lodge, etc.*, 41 M. A. 359.

⁶ *McGowan v. Supreme Council, etc.*, 28 N. Y. Supp. 177.

⁷ *Nagel v. Glastonburger*, 10 N. Y. Supp. 503.

⁸ *Shea v. Mass. Ben. Assn.*, 160 Mass. 289; 35 N. E. R. 855.

⁹ *Grand Lodge A. O. U. W. v. Cressey*, 47 Ill. App. 616.

grand lodge from asserting an irregular or fraudulent reinstatement. Nor is attending in a body the funeral of a suspended member a waiver.¹ Nor its reception of assessments after the death of the member.²

§ 435. **Calling for Proofs of Loss Waives Breach of Conditions.** — If the company, after being notified of a loss, has knowledge of false answers in the application or of a breach of the conditions of the policy and, notwithstanding that fact, calls for proofs of loss; or if, after receiving proofs, with knowledge of such false answers, it asks for additional proofs, it thereby waives the right to rely upon the breach of warranty or of the condition.³ The reason of the rule is obviously that the company should not be permitted by its conduct to cause the insured to go to the expense of proofs of loss, when it knows that it will be a useless act. The question has arisen more frequently in cases of fire than in those of life insurance, but there is no reason why the principle should not apply to both. The

¹ *Marcoux v. Society, etc.*, 91 Me. 250; 39 Atl. R. 1027.

² *Voelkel v. Supreme Tent, etc.*, 116 Wis. 202; 92 N. W. R. 1104 and 1135.

³ *Cobbs v. Fire Assoc., etc.*, 68 Mich. 463; 36 N. W. Rep. 222; 13 W. Rep. 149; *Marthinson v. North British, etc., Ins. Co.*, 64 Mich. 372; 31 N. W. Rep. 291; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Northwestern, etc., Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446; *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Cannon v. Home Ins. Co.*, 53 Wis. 585, where the seemingly opposite cases of *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Ia. 335 and *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; 8 Ins. L. J. 922, are distinguished; *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Canada Landed Credit Co. v. Canada, etc., Ins. Co.*, 17 Grant's Ch. (Up. Can.) 418; *McElroy v. John Hancock M. L. Ins. Co.*, 88 Md. 137; 41 Atl. R. 112; *Metropolitan L. Ins. Co. v. Mitchell*, 175 Ill. 322; 51 N. E. R. 637; *Stephenson v. Bankers' L. Assn.*, 108 Ia. 637; 79 N. W. R. 459; *National Union v. Thomas*, 10 App. D. C. 277; *Metropolitan L. Ins. Co. v. Zeigler*, 69 Ill. App. 447; *Kidder v. Knights Templar, etc.*, 94 Wis. 538; 69 N. W. R. 364; *Covenant M. L. Assn. v. Baughman*, 73 Ill. App. 544; *Alexander v. Grand Lodge, etc.*, 119 Ia. 519; 93 N. W. R. 508.

rule is to be applied with caution, for to constitute a waiver or estoppel all the elements essential to the act must have been present; the company must with knowledge of the breach have encouraged the assured to make proofs, and this encouragement must have materially influenced the performance of the indicated act. The Supreme Court of Iowa has well stated the doctrine in passing upon certain instructions. It said:¹ “The general doctrine of the instructions is that if defendant, with full knowledge of the facts out of which the forfeiture of the policy arose, neglected to declare its intention of insisting on the forfeiture, but, by its acts, recognized and treated the policy as a valid and subsisting contract between it and plaintiff, and induced him to act in that belief, it is precluded now from insisting on the forfeiture. This doctrine is excepted to by defendant. Its position is that to constitute a waiver the provisions of the policy providing for the forfeiture, the acts relied on must be attended with such equitable circumstances as would create an estoppel; and, as plaintiff was not induced by the acts in question to in any manner change his position with reference to the subject of the negotiation, and as the acts were done after the forfeiture occurred, they do not create an estoppel. We think, however, that this position is not tenable. The principle on which the waiver of a forfeiture has been maintained in such cases is undoubtedly similar to that of estoppel. It was so held by this court in *Viele v. Germania Ins. Co.*² But we think it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. Neither forfeitures nor estoppels are favored by the law, and it fol-

¹ *Hollis v. State Ins. Co.*, 65 Ia. 454. The same rule is laid down in *Burnham v. Interstate, etc., Co.*, 117 Mich. 142; 75 N. W. R. 445; *New York Life Ins. Co. v. Baker*, 49 U. S. App. 690; 27 C. C. A. 658; 83 Fed. R. 647; affg. 77 Fed. R. 550.

² 26 Ia. 55.

lows necessarily from this consideration that the waiver of a forfeiture may be sustained by circumstances which do not present the strong equities which would be required to create an estoppel. When plaintiff asserted a claim under the policy for the loss, and defendant was informed of the facts out of which the forfeiture grew, it had the right at once to treat the contract as at an end. If it had elected simply to remain silent, perhaps a waiver could not have been inferred from its silence. But if with knowledge of the circumstances, it continued to treat the contract as of binding force, and induced plaintiff to act in that belief, the rule holding that it thereby waived the forfeiture is a very just one. We think, therefore, that the general doctrine of the instructions is correct, and it is well sustained by the authorities.”¹ There can be, however, no waiver of a stipulation in an agreement unless with knowledge of the circumstances,² consequently false representations in procuring the policy are not waived by demanding additional proofs of loss, the fact that the representations were false not being known to the company when it made such a demand.³

§ 436. Other Acts of Insurer in Regard to Proofs of Loss Amounting to Waiver of Particular Requirements.— In treating of the subject of proofs of loss,⁴ we referred to a few of the most elementary rules of waiver and estoppel which are now so well established as to be axiomatic. Some

¹ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Insurance Co. v. Norton*, 96 U. S. 234; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Northwestern Mut. L. Ins. Co. v. Germania Ins. Co.*, 40 Wis. 453; *Cannon v. Home Ins. Co.*, 53 Wis. 585.

² *Bennecke v. Conn. Mut. L. Ins. Co.*, 105 U. S. 355; *Ronald v. Mut. Reserve F. L. Assn.*, 132 N. Y. 378; 30 N. E. R. 739.

³ *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671; *Phillips v. Grand River, etc., Ins. Co.*, 46 Up. Can. Q. B. 334.

⁴ *Ante*, § 411, *et seq.*

have indeed never been questioned. The first of these is that when proofs are made in time, the company must point out specifically its objections thereto, or it will be estopped to say that the proofs are insufficient; if it makes specific objections it waives all others; and if the proofs are corrected so as to obviate the objections made and they are still not satisfactory, its objections must again be stated within the time limited for making proofs or it will be estopped. The company must point out the defects in the proofs of loss within a reasonable time.¹ Requiring additional proof is no waiver of defense of suicide,² but entering the policy on the books as forfeited is waiver of proofs of loss.³ Mere silence cannot often be construed to be a waiver, but generally the reverse.⁴ Silence is not a waiver if the proofs are received after the stipulated time.⁵ Nor are defects in the proofs waived by a mere rejection of the claim of the insured, it not appearing

¹ *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Fire Ins. Co. v. Felrath*, 77 Ala. 194; *Planters' M. Ins. Co. v. Engle*, 52 Md. 468; *Butterworth v. Western Ass. Co.*, 132 Mass. 489; *Elliot, etc., Bank v. Commercial Union Ins. Co.*, 142 Mass. 142; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423; *Swan v. Liverpool, etc., Ins. Co.*, 52 Miss. 704; *Am. L. Ins. Co. v. Mahone*, 56 Miss. 180; *Breckenridge v. Am. Central Ins. Co.*, 87 Mo. 62; *Hibernia M. F. Ins. Co. v. Meyer*, 39 N. J. L. 482; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 10 N. East. Rep. 242; *Meyers v. Council Bluffs Ins. Co.*, 72 Ia. 176; 33 N. W. Rep. 453; *Ben Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627, and other cases too numerous to mention. See *ante*, § 411.

² *Bachmeyer v. Mut. R. F. L. Assn.*, 82 Wis. 255; 52 N. W. R. 104.

³ *Equitable Life Ass. Soc. v. Winning*, 7 C. C. A. 309; 58 Fed. R. 541.

⁴ *Ayers v. Hartford F. Ins. Co.*, 17 Ia. 176; *Keenan v. Miss, etc., Ins. Co.*, 12 Ia. 126; *Susquehanna M. F. Ins. Co. v. Hallock (Pa.)*, 14 Atl. Rep. 167; *Androveno v. Mutual R. F. L. Assn.*, 38 Fed. R. 806.

⁵ *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Lycoming F. Ins. Co.*, 19 Hun. 238; *St. Amand v. La Cie D'Assurance*, 9 Quebec L. R. 162; *Daniels v. Equitable F. Ins.*, 50 Conn. 551; *Mueller v. Southside F. Ins. Co.*, 87 Pa. St. 399; *Mason v. Andes Ins. Co.*, 25 Up. Can. C. P. 37; *O'Connor v. Commercial, etc.*, 3 Russ. & C., etc. (Nova Scotia) 119; *Central City Ins. Co. v. Oates*, 86 Ala. 558; 6 South. R. 83.

on what ground it was rejected;¹ but otherwise if the cause of rejection did appear and such cause was not for defects in the notice or statement of loss.² The disclaimer of all liability, or the placing of a refusal, to pay on other grounds than the failure to furnish proofs, is a waiver of such proofs, and they need not, under such circumstances, be furnished.³ * An adjustment of the loss and a promise to pay estops the company from denying its liability.⁴ Receipt of proofs and an admission of liability will not estop the company if the breach of condition was unknown at the time.⁵ Nor the mere furnishing the blank

¹ *Spooner v. Vermont M. F. Ins. Co.*, 53 Vt. 156.

² *McMasters v. Westchester Co. M. Ins.*, 25 Wend. 379; *Graves v. Washington M. Ins. Co.*, 12 Allen, 391. But this case of *Spooner v. Vermont*, etc., Ins. Co., *supra*, does not seem to be logically correct.

³ *Covenant Mut. Ben. Assn. v. Soles*, 114 Ill. 463; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362; *Carson v. German Ins. Co.*, 62 Ia. 433; *Phoenix Ins. Co. v. Adams* (Ky.), 8 Ky. Law Rep. 532; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Home Ins. Co. v. Gaddis*, 3 Ky. L. Rep. 159 (Ky. Ct. Appeals); *Aurora*, etc., Ins. Co. v. *Kranich*, 36 Mich. 289; *Rokes v. Amazon Ins. Co.*, 51 Md., 512; *Planter's Ins. Co. v. Comfort*, 50 Miss. 662; *German-Am. Ins. Co. v. Davidson*, 67 Ga. 11; *Merchants', etc., Ins. Co. v. Vining*, 68 *Id.* 197; *Goodwin v. Mass. Mut. L. Ins. Co.*, 73 N. Y. 480; *Kantrener v. Penn. M. L. Ins. Co.*, 5 Mo. App. 581; *Marton v. Mass. M. L. Ins. Co.*, 19 N. H. 92; *King v. Hekla F. Ins. Co.*, 58 Wis. 508; *Zielke v. London Ass. Corp.*, 64 *Id.* 542; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696; *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 546; *Pryn v. Mut. Relief Soc.*, 6 N. Y. St. R. 365; 17 Abb. N. C. 53; *Penn. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Kansas Protective Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275; *Lazensky v. Sup. Lodge K. of H.*, 31 Fed. Rep. 592, and many others. See *ante*, § 413.

* *Fishback v. Phoenix Ins. Co.*, 54 Cal. 422; *Simpson v. Windham*, etc., Ins. Co., 57 N. H. 160; *Greenfield v. Mass. Mut. L. Ins. Co.*, 47 N. Y. 430; *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *Reed v. McLaughlin*, 2 Han. (N. B.) 128; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560.

⁵ *Stuart v. Mut. Res. L. Assn.*, 78 Hun, 191; 28 N. Y. Supp. 944; *Sharpe v. Commercial Trav. Assn.*, 139 Ind. 92; 37 N. E. R. 353; *Hubbard v. Mut. R. F. L. Assn.*, 80 Fed. R. 681.

forms;¹ nor negotiating for a settlement.² But an unreasonable retention of the proofs without objection is a waiver of the limitation of time for suit.³ And if the policy provides that notice of loss shall be given within a longer time than that required under a statute, the statutory requirement is waived.⁴ But a company cannot take advantage of any delays or failures on the part of the insured to comply with the requirements of the contract which are caused by its own acts or those of its officers.⁵ A condition that no agent can waive the provisions of the policy except by indorsement does not apply to proofs of loss.⁶

§ 437. When Insurer is Precluded From Certain Defenses.—It has been also held that when sued upon a policy the company cannot make any objections to paying a loss that are different from or additional to those which it stated when it refused to pay.⁷ An insurance company, however, is not deprived of the defense of breach of warranty because, when a claim is first presented, while denying its liability, it omits to disclose the ground of defense or states another ground than that on which

¹ *Callies v. Modern Woodmen*, 98 Mo. App. 521; 72 S. W. R. 713.

² *Hughes v. Wisconsin Oddfellows, etc., Assn.*, 98 Wis. 292; 73 N. W. R. 1015.

³ *Thomas v. Guaranty, etc., Co.*, 73 Mo. App. 371; *Stambler v. Order Pente.*, 159 Pa. St. 492; 28 Atl. R. 301.

⁴ *Ellis v. Mass. M. L. Ins. Co.*, 113 Cal. 612; 45 Pac. R. 988.

⁵ *Railway Officials, etc., Co. v. Armstrong*, 22 Ind. App. 406; 53 N. E. R. 1037.

⁶ *Am. F. Ins. Co. v. Sisk*, 9 Ind. App. 305; 36 N. E. R. 659.

⁷ *Castner v. Farmers' Mut. Ins. Co.*, 50 Mich. 273; *Brink v. Hanover F. L. Ins. Co.*, 80 N. Y. 108; *Wolf v. District Grand Lodge, etc.*, 102 Mich. 23; 60 N. W. R. 445; *National Life, etc., Co. v. Whitacre*, 15 Ind. App. 506; 43 N. E. R. 905; *Smith v. German Ins. Co.*, 107 Mich. 270; 65 N. W. R. 236; *Bini v. Smith*, 36 App. Div. 463; 55 N. Y. Supp. 842; *Taylor v. Supreme Lodge, etc. (Mich.)*, 97 N. W. R. 680. But see *Hart v. Fraternal Alliance*, 108 Wis. 490; 84 N. W. R. 851.

it finally relies; there must be in addition evidence justifying a finding that with full knowledge of the facts, there was an intention to abandon or not to insist upon such defense, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury.¹ And a party to a litigation cannot be confined to the position first taken by him and out of which the litigation arose if he took such position under a mistake of facts that was due to the want of information which the other party ought to have given him.² An offer to compromise can never estop the party making it from setting up any defense, or asserting any right to which the offer relates,³ but by paying the amount due on a policy the company waives all questions as to the validity of the contract which it had the means of raising when it paid, except fraud.⁴ Delivery of a check estops the company from claiming that the payee is not the right party.⁵

¹ *Devens v. Mechanics', etc., Ins. Co.*, 83 N. Y. 168; *Graham v. Firemen's Ins. Co.*, 9 Daly, 341; *Hubbard v. Mut. Reserve, etc., Assn.*, 80 Fed. R. 681.

² *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141.

³ *Cook v. Continental Ins. Co.*, 70 Mo. 610.

⁴ *Metropolitan L. Ins. Co. v. Harper*, 3 Hughes, 260. Citing *National L. Ins. Co. v. Minch*, 53 N. Y. 144; *Mutual L. Ins. Co. v. Wager*, 27 Barb. 354. Various questions of law relating to proofs of loss are discussed in *Buffalo, etc., Co. v. Knights Templar, etc., Co.*, 126 N. Y. 450; 27 N. E. R. 942; affg. 9 N. Y. Supp. 346, and *Knights Templar, etc. v. Vail*, 206 Ill. 484; 68 N. E. R. 1103. As to estoppel not resulting from use of proxy, *Hill v. Mut. Reserve, etc., Assn.*, 128 N. C. 463; 39 S. E. R. 56. By paying a loss a company is estopped from claiming that the policy was fraudulently obtained. *New York Life Ins. Co. v. Hord* (Ky.), 77 S. W. R. 380. A number of questions arise as to the effect of proofs of loss after action brought to recover on the policy, and to what extent the assured is precluded from contradicting the statements therein made, but this matter relates more properly to evidence and will be considered in the following chapter. *Post*, § 471.

⁵ *N. W. Mut. L. Ins. Co. v. Kidder* (Ind.), 70 N. E. R. 489.

CHAPTER XIV.

REMEDIES, PRACTICE, PLEADING AND EVIDENCE, INSOLVENCY AND WINDING UP.

- § 440. Concerning the Subject of this Chapter.
- 441. Parties and Forms of Action in Suits by or against Voluntary Associations.
- 442. Remedies of Members of Benefit Societies, Unlawfully Expelled: Jurisdiction of Equity: *Mandamus*: Action for Damages.
- 443. Limitations in Policies on Time within which Action must be Brought Thereon, or as to place of Bringing Suit, or as to Issue of Execution.
- 444. When the Statute of Limitations Applies.
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- 475. Winding up by Insurance Commissioner: Special Deposit with State; Insolvency of Mutual Company: Effect of Charter Provisions.
- 476. Attachments of Company's Property by Policy Holders.
- 477. Receivers of Insurance Companies.
- 478. Insolvent Life Insurance Companies: *Status* of Policy Holders.
- 479. Insolvent Benefit Societies.
- 479a. The same Subject — Receivers of Insolvent Benefit Societies.
- 480. On Dissolution of Mutual Insurance Company Surplus Assets, After Creditors are paid, Vest in State.

§ 440. Concerning the Subjects of this Chapter. — We shall not attempt, within the limits of this single chapter, to discuss at length all the matters, or examine all the cases, relating to remedies, practice, pleading and evidence in suits upon insurance contracts. If it were even possible to do this, it would not be desirable, for the various States have different methods of procedure, and remedies and practice are not uniform; many of the decisions involve local questions only, and are of no general value. We can only refer to certain primary rules and cite authorities bearing on general principles, leaving the practitioner to supplement what may here be said by reference to local statutes and decisions. There is no reason why remedies, or pleadings, or evidence in suits upon insurance contracts should be ex-

ceptions and governed by special rules. In fact, the same fundamental and general principles apply to remedies upon insurance policies as to those upon other contracts. The cases here to be referred to or examined are simply the application of general principles to individual, or special, conditions of facts. We have necessarily, in the preceding chapters, often spoken incidentally, and sometimes directly, of many matters which, perhaps, might have been more properly reserved until now, for it is difficult to omit reference to questions of remedies, procedure or evidence, when they have been discussed in connection with other subjects. What is to be here written, therefore, may sometimes be supplementary to what has gone before and it is to be taken in connection therewith. The various matters considered in this chapter are also, to a great extent, inharmonious and disjunctive, but it seemed best to here collect all the cases of general value bearing on points not before discussed, as well as those relating to the subjects mentioned in the title.

§ 441. Parties and Forms of Action in Suits by or against Voluntary Associations.—In what way suits shall be brought by or against voluntary, unincorporated associations, and whether all the members of such society shall be made parties, or only its president or treasurer, is sometimes regulated by statute;¹ but generally the ques-

¹ Laws N. Y. 1851, ch. 455, § 1; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300; *Austin v. Searing*, 16 N. Y. 112; *April v. Baird*, 52 N. Y. upp. 973; *Boston, etc. v. Brooklyn, etc.*, 75 App. Div. 145; 77 N. Y. Supp. 373. As to form of action in Pennsylvania, see *Paul v. Keystone Lodge*, 3 W. N. C. 408; *Luders v. Volp*, 8 W. N. C. 417; *Kurz v. Eggert*, 9 W. N. C. 126. And *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; 37 Pac. R. 245, is also a case where the defendant was unincorporated. The laws of Colorado are considered in *Endowment Rank, etc. v. Powell*, 25 Colo. 154; 53 Pac. R. 285; those of Michigan in *U. S. Heater Co. v. Iron Moulders, etc.*, 129 Mich. 354; 88 N. W. R. 889.

tion of parties and form of action are determined as in ordinary cases. Voluntary associations are recognized by the common law and the right of members to sue in behalf of themselves and others in matters pertaining to or affecting their common interests has been sustained.¹ A voluntary association cannot be sued by name as such;² nor sue;³ nor can there be a judgment against a voluntary association as such by name.⁴ But it is said that an action can be maintained in the name of a voluntary association if no plea in abatement is filed.⁵ The trustees of an unincorporated society may also sue as such where the statute authorizes suits to be brought by trustees of an express trust.⁶ And the president can sue if authorized by a resolution of the association.⁷ It has been held⁸ that the trustees of a voluntary association cannot maintain an action against an ex-treasurer for the funds of the association, he refusing to turn them over to his successor, no warrant being drawn, the laws of the association not providing for such an emergency.⁹ Nor by the treasurer.¹⁰

¹ *Beatty v. Kurtz*, 2 Pet. 566; *Mears v. Moulton*, 30 Md. 142; *Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Babb v. Reed*, 5 Rawle, 151; *Platt v. Colvin*, 50 Ohio St. 703; 36 N. E. R. 735.

² *State v. Staed*, 64 Mo. App. 31; *Am. Steel W. Co. v. Wire drawers Union, etc.*, 90 Fed. R. 598. See as to law of Maryland to the contrary, *Littleton v. Wells, etc., Counc. (Md.)*, 56 Atl. R. 798.

³ *Nichols v. Bardwell Lodge, etc.*, 105 Ky. 168; 48 S. W. R. 426-1091.

⁴ *O'Connell v. Lamb*, 63 Ill. App. 652; *Hajek v. Bohemian, etc., Soc.* 66 Mo. App. 568; *Methodist Church, etc. v. Clifton (Tex. Civ. A.)*, 75 S. W. R. 732.

⁵ *Liederkrantz, etc., Soc. v. Germania, etc., Soc.*, 103 Pa. St. 265; 29 Atl. R. 918.

⁶ *Kuhl v. Meyer*, 35 M. A. 206; 42 Mo. App. 474; 50 Mo. App. 648; *Hysinger v. Supreme Lodge, etc.*, 42 Mo. App. 628; *Hammerstein v. Parsons*, 38 Mo. App. 332; 29 Mo. App. 509.

⁷ *Swain v. Miller*, 72 Mo. App. 946.

⁸ *Smith v. Pinney*, 86 Mich. 484; 49 N. W. R. 305.

⁹ See also as to powers of trustees, *ante*, § 143a.

¹⁰ *Dwelle v. Plummer*, 5 Colo. App. 113; 37 Pac. R. 947.

But the members can sue.¹ In what way benefit societies, if voluntary associations merely, are to be sued or are to sue, depends upon whether the controversy is internal, as where a member sues, or external, as where an outsider sues or is sued by the society. How actions are to be brought also depends upon the way in which the association is regarded, whether as an acting corporation or partnership. The fact that the plaintiff was a member of the voluntary association he was suing at law has been held to be no bar to the action,² but the contrary is probably the better doctrine.³ Of these questions we have already spoken.⁴ A lodge is not liable in an action for an act of wrong, outside of the declared and real purpose of the association, for such wrongful act stands by itself to be answered for only by those who joined in its perpetration.⁵ If slanderous words are spoken by a lodge or mutual association, of a member, as by adopting a resolution containing the objectionable language, an action will not lie against the association as a partnership, but the redress is against the wrong-doers in their individual capacity.⁶ And where a committee, appointed by an incorporated lodge of a mutual aid society to investigate certain bills incurred for expenses in sickness and presented by a member for payment, but not specially directed to make a printed report, did make a printed report which contained libelous matter in reference to

¹ *Stemmerman v. Lillienthal*, 54 S. C. 440; 32 S. E. R. 535; *Societa, etc. v. Cenni*, 62 N. J. L. 652; 42 Atl. R. 743.

² *McCabe v. Goodfellow*, 133 N. Y. 89; 30 N. E. 728.

³ *Huth v. Humboldt Stamm*, 61 Conn. 227; 23 Atl. R. 1084; *McMahon v. Rauhr*, 47 N. Y. 67; *Warren v. Stearus*, 19 Pick. 73.

⁴ *Ante*, §§ 27, *et seq.*; *Lindley on Partnership*, bk. I, ch. 1, § 5; *Snow v. Wheeler*, 113 Mass. 179; *McKinley v. Irvine*, 13 Ala. 681, 706; *McMahon v. Rauhr*, 47 N. Y. 67.

⁵ *Snow v. Wheeler*, 113 Mass. 179.

⁶ *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284; 4 S. E. Rep. 905.

such member and placed copies thereof on the secretary's desk at a regular meeting of the society; and members took copies of the same, which afterwards came into the hands of persons not members; and the society afterwards adopted the report: it was held¹ that there was no publication by the society of such libelous report to render it liable therefor, but whatever was done in relation to its being circulated and printed was the individual acts of the committee and of certain members. Words spoken in the lodge room, reports of committees, or resolutions adopted by the lodge, that are slanderous or libelous, are as a rule privileged, although by a malicious publication certain members responsible therefor might be personally liable.² It is unnecessary, however, to here consider further this and similar questions. Equity takes cognizance of the affairs of voluntary associations, and grants relief by treating them as partnerships, or otherwise, or by looking into the scheme and compelling conformity to it; or reforming it and enforcing it; or if the plan is deemed impracticable, decreeing a dissolution and distributing the funds; and, speaking generally, it redresses, as far as it can, the grievances of the members of these societies who complain to it of injustice affecting their pecuniary interests therein. An action can be brought in equity against the president of a society as custodian of its funds to subject them to a debt of the society,³ and the trustees, if non-resident, are not necessary parties.⁴ Service on the

¹ *De Senancour v. Societe La Prevoyance*, 146 Mass. 616; 16 N. E. R. 553.

² *Shurtleff v. Stevens*, 51 Vt. 501; *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384; *Fawcett v. Charles*, 13 Wend. 474; *Streety v. Wood*, 15 Barb. 105.

³ *Colley v. Wilson*, 86 Mo. App. 396; *Harris v. Wilson*, 86 Mo. App. 406.

⁴ *Colley v. Wilson*, *supra*. But see *Greer, Mills & Co. v. Stoller*, 77 Fed. R. 1.

president and secretary is good.¹ The general rules of equity apply and benefit societies in the eye of the law, are, if not incorporated, to be governed and aided, or wound up and their affairs settled, as in the case of other voluntary associations.² If a bill is filed to distribute the funds of a voluntary association formed for social and charitable purposes among its members, a decree will not be granted unless it clearly appears that its operations have ceased, its objects entirely failed and its purposes abandoned.³

§ 442. **Remedies of Members of Benefit Societies Unlawfully Expelled: Jurisdiction of Equity: Mandamus: Action for Damages.** — The courts have frequently been called upon to restore members of benefit societies who have been expelled unlawfully, or are threatened with unlawful expulsion. In another place⁴ we have considered the general principles governing the expulsion, or discipline, of members of incorporated and unincorporated societies, and it is not necessary to again refer to them. We may, however, here repeat the rule that if the lodge or expelling tribunal, has jurisdiction, if the by-laws defining the offense and punishment are valid, and the proceedings of the lodge, or its tribunal, are regular, the action thus taken is final. Neither courts of law, nor those of equity

¹ *Van Houten v. Pine*, 36 N. J. Eq. 133; *Fitzpatrick v. Rutter*, 160 Ill. 282; 43 N. E. R. 392. As to other questions of practice: *N. Y. Board, etc. v. Whipple*, 36 App. Div. 49; 55 N. Y. Supp. 155; *Cronkhite v. Trexler*, 187 Pa. St. 100; 41 Atl. R. 22; *Downs v. Bennett*, 63 Kan. 653; 66 Pac. R. 623; 55 L. R. A. 560; *Slater v. U. S. Health, etc., Assn. (Mich.)*, 95 N. W. R. 89; *State v. Stead*, 64 Mo. App. 31; *Missouri Bottlers Assn. v. Finnerty*, 81 Mo. App. 525.

² *Van Houten v. Pine*, 36 N. J. Eq. 133; *Pearce v. Piper*, 17 Ves. 1; *Lindley on Partnership*, bk. IV.; *ante*, § 27.

³ *Roper v. Burke*, 83 Ala. 193; 3 S. Rep. 439; *Burke v. Roper*, 79 Ala. 138; *Strickland v. Pritchard*, 37 Vt. 324; *Robbins v. Waldo Lodge*, 78 Me. 565; 7 Atl. Rep. 540; *Hinkley v. Blethen*, 78 Me. 221.

⁴ *Ante*, § 95, *et seq.*

will in such case examine into the merits of the case. The only questions to be considered are: 1. Did the lodge, or its tribunal, have jurisdiction and proceed regularly? 2. Was the by-law establishing the offense and prescribing the punishment valid? If these questions be answered affirmatively the civil courts will proceed no further. If a member of a benefit society is either wrongfully threatened with expulsion, or has been unlawfully expelled, he may resort to a court of equity and enjoin the unlawful proceedings or invoke assistance in being restored.¹ The court will, however, only look so far into the case as to satisfy itself whether there has been an arbitrary or capricious exercise of power, or whether the society had jurisdiction, or the by-law under which it acted was valid; if it finds that there was jurisdiction, and a valid by-law and no abuse of power, it will not interfere.² In a case in England,³ where the question was as to the good faith of the governing committee, five out of its eighteen members were allowed to testify that they acted *bona fide*, and were not influenced by the other party to the controversy. In another case⁴ the court declined to take the plaintiff's assertion that in his

¹ Gregg v. Mass. Med. Soc., 111 Mass. 185, *contra*.

² *Ante*, § 108; Dawkins v. Antrobus, 17 Ch. D. 615; 44 L. T. 557; 29 W. R. 511; Hopkinson v. Exeter (Marquis), 5 L. R. Eq. 63; 37 L. J. Ch. 173; 16 W. R. 266; Richardson-Gardner v. Freemantle, 24 L. T. 81; 19 W. R. 256; Littleton v. Blackburne, 45 L. J. Ch. 219; 33 L. T. 641; Labouchere v. Wharnccliffe (Earl), 13 Ch. Div. 346; 41 L. T. 638; 28 W. R. 367; Fisher v. Keane, 11 Ch. Div. 353; 49 L. J. Ch. 11; 41 L. T. 335; Leech v. Harris, 2 Brewst. 571; Riddell v. Harmony F. Co., 8 Phila. 310; Sperry's Appeal, 116 Pa. St. 391; Loubat v. Leroy, 15 Abb. N. C. 1 and note; Olery v. Brown, 51 How. Pr. 92; Fritz v. Muck, 62 How. Pr. 69; Van Houten v. Pine, 36 N. J. Eq. 133 and note. See also Croak v. High Court, etc., 162 Ill. 298; 44 N. E. R. 525; affg. 62 Ill. App. 47, and Connolly v. Masonic Mut. Ben. Assn., 58 Conn. 552; 20 Atl. R. 671; 9 L. R. A. 428 and note.

³ Richardson-Gardner v. Freemantle, 24 L. T. (N. S.) 81; 19 W. R. 256.

⁴ Lyttleton v. Blackburne, 45 L. J. Ch. 219; 33 L. T. (N. S.) 641.

belief, or in his suspicion, the committee acted capriciously in expelling him, in view of the fact that the committee, when called upon, swore that they had not exercised their power capriciously, unjustly, maliciously or corruptly, and gave their reasons. The most appropriate remedy for a member of a society wrongfully expelled is by a proceeding in *mandamus* to compel his restoration.¹ There are numerous very early instances of a resort to this remedy in the United States,² and it has always been regarded as particularly effective and complete.³ The Supreme Court of Rhode Island holds that it is the only proper remedy as an action for damages is based on an acquiescence which would be a waiver.⁴ If the association is one having no property, and no property right is effected, and no personal injury is inflicted, it is doubtful whether a member however unjustly or summarily expelled, can be restored by *mandamus*,⁵ or indeed has any remedy whatever.⁶ If the member expelled has, under the by-laws, the right of ap-

¹ *Ante*, § 109; *Albers v. Merchants' Exchange*, 39 M. A. 583; see also *Lysaght v. Stone Masons, etc., Soc.*, 55 Mo. App. 538; *Ostrom v. Greene*, 20 Misc. R. 177; 45 N. Y. Supp. 852.

² *Delacey v. Neuse Riv. Nav. Co.*, 1 Hawks. 274; 9 Am. Dec. 636 (1830); *Green v. African, etc., Soc.*, 1 S. & R. 254 (1815).

³ *State ex rel. Sibley v. Cartaret*, 40 N. J. L. 295; *State ex rel. Waring v. Georgia Med. Soc.*, 38 Ga. 608; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; *Commonwealth v. Penn. Ben. Inst.*, 2 S. & R. 141; *Medical & Surg. Soc. v. Weatherly*, 75 Ala. 248; *Fuller v. Plainfield, etc.*, 6 Conn. 532; *State v. Adams*, 44 Mo. 585; *People v. N. Y. Benev. Soc.*, 3 Hun, 361; *Manning v. San Antonio Club*, 63 Tex. 166; *Evans v. Phila. Club*, 50 Pa. St. 107.

⁴ *La Valle v. Societe St. Jean Baptiste*, 17 R. I. 680; 24 Atl. R. 467; 16 L. R. A. 392; *State v. Lipa*, 28 Ohio St. 665.

⁵ *Sale v. First Reg. Baptist Ch.*, 62 Ia. 26; 49 Am. Rep. 136; *Rigby v. Connol*, 28 W. R. 650; *Manning v. San Antonio Club*, 63 Tex. 166; *White v. Brownell*, 4 Abb. Pr. (N. S.) 162; 2 Daly, 358; *Fritz v. Muck*, 62 How. Pr. 69; *People v. German, etc., Ch.*, 53 N. Y. 103.

⁶ *Hardin v. Trustees Second Baptist Ch.*, 51 Mich. 137; *McKane v. Adams*, 4 N. Y. Supp. 401.

peal which he has not exercised, the court will not award a *mandamus*,¹ nor, if though expelled without notice, he admits his guilt.² The rules applying to ordinary proceedings in *mandamus* and the practice in such cases are to be followed by members of societies and lodges who invoke this potent and summary remedy. The petition, alternate writ and peremptory writ must be sufficient in these as in other cases, and the hearing is the same. The general rule, already referred to, governs here also that the court upon the hearing will only inquire as to the jurisdiction of the lodge, or expelling tribunal, not into the merits of the case. This is a principle well established and adhered to.³ In order to enable the court to judge whether the society had jurisdiction, the return to an alternate writ of *mandamus* must set forth distinctly and in detail all the facts relating to conviction, both as to the accusation, or charge, and the methods and mode of proceeding. It is not enough to state in general terms that the member expelled was guilty of a violation of duty, the charges must be specific.⁴ The return must be exact and full and state facts, not legal conclusions;⁵ and these facts must not be set forth argumentatively, inferentially, or evasively, but with certainty to a common intent.⁶ It is enough in pleading a by-law to set

¹ *Screwmen's Ben. Assn. v. Benson*, 76 Tex. 552; 13 S. W. R. 379.

² *State v. Temperance, etc.*, 42 M. A. 485.

³ *Commonwealth v. Beneficial Soc.*, 8 W. & S. 247; *Toram v. Howard Ben. Assn.*, 4 Barr, 519; *Sperry's Appeal*, 116 Pa. St. 391; 9 Atl. Rep. 478; *People v. St. George's Soc.*, 28 Mich. 261; *ante*, § 109.

⁴ *Commonwealth v. Guardians of the Poor, etc.*, 6 S. & R. 469. As to various questions in *mandamus* proceedings see *Murray v. Supreme Hive, etc.* (Tenn.), 80 S. W. R. 827; *People v. Grand Lodge, etc.*, 166 Ill. 71; 46 N. E. R. 768.

⁵ *Rex v. Mayor of Coventry*, 2 Salk. 430; *R. x v. Mayor of Abington*, 2 Salk. 432; *Rex v. Mayor of Liverpool*, 2 Burr. 731; *Green v. African, etc. Soc.*, 1 S. & R. 254; *Commonwealth v. German Soc.*, 15 Pa. St. 251.

⁶ *Commonwealth v. Commissioners, etc.*, 37 Pa. St. 277; *Rex v. Gas-kin*, 8 Durnf. & E. 209; *Society, etc. v. Meyer*, 52 Pa. St. 125.

out its legal effect without reciting its exact language, and under such a pleading the by-law itself may be put in evidence.¹ Notice is not sufficiently proved by the testimony of a witness that he served upon the accused member a written notice to appear at a particular time, where he also testifies that he cannot say what the notice was, as he handed it to the accused without reading it to him, and it was written by an officer of the society who was not examined.² The Supreme Court of Michigan has said:³ “The only ground on which this court can interfere with organized bodies by *mandamus* in aid of a member, is that as corporations they are subject to our judicial oversight to prevent their depriving members of corporate privileges illegally. Where such bodies are not corporations, or where the question presented does not involve tangible and valuable corporate privileges, we cannot interfere in this way. A person who is wronged, if he has a legal cause of action, may pursue it in the appropriate action for damages against the persons who wrong him, but *mandamus* cannot lie.” It seems to be the rule that while *mandamus* is the remedy in case of expulsion from membership in a corporation, equity is the forum where the society is unincorporated.⁴ In the case cited the court said: “We find on examination, that nearly all the cases of expulsion from societies, in which the remedy by injunction has been successful, or where the jurisdiction of equity was conceded, were cases where the society was not incorporated.⁵ That *mandamus* is the regular remedy to restore a member of a

¹ *Kehlenbeck v. Logeman*, 10 Daly, 447.

² *Downing v. St. Columbia's Soc.*, 10 Daly, 262.

³ *Burt v. Mich. Grand Lodge, etc.*, 66 Mich. 85; 33 N. W. Rep. 13.

⁴ *Albers v. Merchants' Exchange*, 39 M. A. 583.

⁵ *Leach v. Harris*, 2 Brewst. 571, 576; *Rorke v. Russell*, 2 Lans. 244; *Powell v. Abbott*, 9 Week. Notes of Cas. (Pa.) 231; *Bouldin v. Alexander*, 15 Wall. 131; *Bates v. Houston*, 66 Ga. 198.

corporation who has been illegally disfranchised, has certainly been the settled law since the decision of the King's Bench in the case of *Bagg* in the year 1616.¹ In the Supreme Court of New York the distinction has been taken that, while *mandamus* is the proper remedy, where the party aggrieved seeks restoration to a membership in a corporation² yet this principle does not apply in the case of an unincorporated association, but that, in the latter case, if the party has any remedy, it is by suit, that is, by an action for an order of restoration.³ Decisions in Pennsylvania, Wisconsin, and perhaps in other States which accord the remedy in equity in the case of quarrels among the members of religious societies, corporate or unincorporated, rest on somewhat exceptional grounds, for there, as has been pointed out in Pennsylvania, a resort to equity may be necessary in order to prevent a multiplicity of actions.⁴ The jurisdiction of equity over charitable corporations rests on another ground." Where the member of a beneficial association was entitled to notice before expulsion, but was expelled without notice and in his absence, it was held, in Pennsylvania, that he could recover damages commensurate with the extent of the injury caused by the expulsion.⁵ And if one excludes a member of a religious society from the proper enjoyment of the property for religious worship and instruction he can maintain an action therefor, and in fixing his damages the injury to his feelings may be consid-

¹ *Bagg's Case*, 11 Co. Rep. 93.

² *People v. Benevolent Society*, 3 Hun, 361.

³ *Fritz v. Muck*, 62 How. Pr. 69.

⁴ *Roshi's Appeal*, 69 Pa. St. 462, 467; *Kerr v. Trego*, 47 Pa. St. 265; *Lutheran Evangelical Church v. Gristgau*, 34 Wis. 328, 366.

⁵ *Washington Ben. Soc. v. Bacher*, 20 Pa. St. 425. See also *Merschheim v. Musical Pr. Union*, 55 Hun, 608; 8 N. Y. Supp. 702, where items making up the damages sustained are considered. In *Supreme Council, etc. v. Gambati*, 29 Tex. Civ. A. 80; 69 S. W. R. 114, the right of action was denied as it was held that plaintiff was still a member.

ered.¹ It has been held, however, that if the proceedings were in good faith no damage can be recovered.² The right of a member of an incorporated or unincorporated society to bring his action at law for damages sustained because of unlawful expulsion never seems to have been questioned and it is only incidentally in other proceedings that this right has been referred to.³ By appearing and standing trial and afterwards appealing to a higher judiciary the member waives irregularities and acknowledges jurisdiction. When expelled he cannot afterward sue for damages.⁴ If, however, a member of a benevolent society brings a civil action to recover damages for the loss of his rights and privileges as such member, occasioned by the expulsion, the bringing of such action is a waiver of his rights to a *mandamus* to restore him to his rights and privileges of membership.⁵ Ordinarily, one partner cannot sue his copartners at law but in the case above stated, of a member of a voluntary association suing for damages for unlawful expulsion, the suit for damages is an election to remain an outsider and the action is maintained on that theory.

§ 443. **Limitations in Policies on Time Within which Action Must be Brought Thereon: or as to Place of Bringing Suit, or as to Issue of Execution.** — The contract of insurance being a voluntary one, the insurers have the right to designate the terms upon which they will be

¹ *People v. German U. Ev. Ch.*, 53 N. Y. 103.

² *Durel v. Perseverance Co.*, 47 La. Ann. 1101; 17 Sou. R. 591.

³ *Ludowski v. Polish Catholic, etc., Soc.*, 29 M. A. 337. See also cases last and next cited.

⁴ *Peyre v. Mut. Relief Soc., etc.*, 90 Cal. 240; 27 Pac. R. 191.

⁵ *State v. Lipa*, 28 Ohio St. 655. See also *Lahiff v. St. Joseph Soc. (Conn.)*, 57 Atl. R. 692, where the right to sue an unincorporated association was sustained. Also *Schmidt v. Social, etc., Soc.*, 6 N. J. L. J. 57. As to liability for injuries received during initiation, see *ante*, § 63b.

responsible for losses. It has accordingly been held that a condition in a policy of insurance that no action against the insurers on the policy shall be sustained unless commenced within a certain time—as, for example, twelve months, after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is valid and is not against the policy of the statute of limitations.¹ In some States laws exist specially relating to the time within which actions on insurance policies shall be brought. In such case

¹ *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *Veth v. Clinton F. Ins. Co.*, 30 Fed. Rep. 668; *Friezin v. Allemania F. Ins. Co.*, *Id.* 352; *O'Laughlin v. Union M. L. Ins. Co.*, 11 Fed. Rep. 280; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Williams v. Mut. Ins. Co.*, 20 Vt. 222; *Wilson v. Aetna Ins. Co.*, 27 *Id.* 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31 Pa. St. 449; *Brown v. Savannah Ins. Co.*, 24 Ga. 101; *Portage Ins. Co. v. West*, 6 Ohio St. 602; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 603; *Fullam v. N. Y. Ins. Co.*, 7 Gray, 61; *Carter v. Humboldt Ins. Co.*, 12 Ia. 287; *Stout v. City Ins. Co.*, *Id.* 371; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 29 Barb. 552; *Gooden v. Amoskeag Co.*, 20 N. H. 73; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Same v. Same*, 7 *Id.* 301; *Ames v. New York Ins. Co.*, 4 Kern. 252; *Roach v. N. Y. & Erie Ins. Co.*, 30 N. Y. 546; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38; *Carraway v. Merchants' M. Ins. Co.*, 26 La. 298; *Merchants' M. Ins. Co. v. La Croix*, 35 Tex. 249; *Cornett v. Phoenix Ins. Co.*, 67 Ia. 388; *Underwriters Agency v. Sutherlin*, 55 Ga. 266; *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499; *Glass v. Walker*, 66 Mo. 32; *Lasker v. Kenton Ins. Co.*, 58 N. H. 469; *Farmers', etc., Ins. Co. v. Barr*, 94 Pa. St. 345; *Universal F. Ins. Co. v. Weiss*, 106 Pa. St. 20. See also *Lowe v. U. S. Mut. Acc. Assn.*, 115 N. C. 18; 20 S. E. R. 169; *McFarland v. Railway Officials, etc. (Wyo.)*, 38 Pac. R. 347; *Provident Sav., etc. v. Howell*, 110 Ala. 508; 18 Sou. R. 311; *Shackett v. Peoples, etc., Soc.*, 107 Mich. 65; 64 N. W. R. 875; *Richter v. Mich. M. L. Ins. Co.*, 66 Ill. App. 606; *Sullivan v. Prudential Ins. Co.*, 172 N. Y. 482; 65 N. E. R. 268. *Contra*, *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Wilson v. State F. Ins. Co.*, 7 Low. Can. J. 223. And the right is questioned in *Winchester F. Ins. Co. v. Dodge*, 44 Mich. 420. Such a provision is void under the Missouri Statute, Rev. St. 1899, § 899; *Brower v. Supreme Lodge, etc.*, 74 Mo. App. 507; *Summers v. Fidelity, etc., Assn.*, 84 Mo. App. 605.

the statute governs as to all policies thereafter issued.¹ The action mentioned in the condition (which must be commenced within the twelve months) must be the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case, although such previous action was commenced within the period prescribed.² The time taken in attempting to sue a domestic company in a foreign jurisdiction is not to be deducted from the time allowed by the policy in suing on it,³ and an action is not begun within the limitation unless the court in which proceedings were instituted had jurisdiction.⁴ The limitation concerning the time within which suits must be brought does not apply to actions to recover money paid as premiums, but only to actions on the policy,⁵ nor does it apply to actions against the stockholder of a company,⁶ nor to one who holds the policy as collateral security, if the condition is in the charter of a mutual company;⁷ nor to proving up a claim before a master,⁸ nor to an ancillary action brought to reform the policy;⁹ nor to an action to recover where the company induced a settlement by false representations;¹⁰ nor to an action for rescis-

¹ *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Ins. Co. N. A. v. Brim*, 111 Ind. 281; 12 N. East. Rep. 315; *Mass. Ben. Assn. v. Hale*, 96 Ga. 802; 23 S. E. R. 849.

² *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *O'Laughlin v. Union Cent. L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280; *McFarland v. Aetna Ins. Co.*, 6 W. Va. 437; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99. See *Madison Ins. Co. v. Fellowes*, 1 Dis. 217; aff'd 2 Dis. 128.

³ *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188.

⁴ *Keystone M. B. Assn. v. Norris*, 19 W. N. C. 248.

⁵ *Waller v. Northern Assn. Co.*, 64 Ia. 101.

⁶ *Davis v. Stewart*, 26 Ohio St. 643.

⁷ *Smith v. Atlantic, etc., Ins. Co.*, 1 Brun. Coll. Cas. 573; 12 Law. Rep. 408.

⁸ *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

⁹ *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. R. 724.

¹⁰ *Wabash, etc., Union v. James*, 8 Ind. App. 449; 35 N. E. R. 919.

sion.¹ And the limitation is not binding when it depends upon a condition which either party to it may defeat,² as for example, that no suit shall be brought until the case has been submitted to arbitration, for either party may refuse to submit. Nor does the condition apply when suit is brought on the adjustment of the loss, for the action is on the independent agreement, though it rests in parol.³ An action originally brought within the prescribed time is not affected by an amendment changing the plaintiff,⁴ or the defendant, if it appeared,⁵ for in such case the amendment relates back to the institution of the suit. Where the suit is dismissed and a second suit is brought after the period limited it is too late,⁶ and so where the first suit is held premature on appeal.⁷ A suit is commenced when the precept is filed and the summons issued.⁸ A stipulation in a policy that no execution shall issue on a judgment obtained against the company until a certain period after the rendition thereof is valid. Such a provision in the charter of a mutual company was sustained, although the judgment upon which the execution was sought was founded upon a foreign judgment obtained a long time before.⁹ A stipulation or condition in a policy that suit shall be commenced in a certain court has been held to be void as against public policy.¹⁰ And a condition

¹ *Daix v. Supreme Council, etc.*, 127 Fed. R. 374.

² *Leach v. Republic F. Ins. Co.*, 58 N. H. 245.

³ *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *Ill. M. F. Ins. Co. v. Archdeacon*, 82 Ill. 236.

⁴ *Fame Ins. Co. v. Thomas*, 10 Bradw. 545; *aff'd* 108 Ill. 91; *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

⁵ *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467.

⁶ *McElroy v. Continental Ins. Co.*, 48 Kan. 200; 29 Pac. R. 478; *State Ins. v. Stoffels*, 48 Kan. 364, 29 Pac. R. 479.

⁷ *Howard Ins. Co. v. Hocking (Pa. St.)*, 18 Atl. R. 614.

⁸ *Schroeder v. Merchants' etc., Ins. Co.*, 104 Ill. 71.

⁹ *Judkins v. Union Mut. F. Ins. Co.*, 39 N. H. 172.

¹⁰ *Richard v. Manhattan L. Ins. Co.*, 31 Mo. 518, *Indiana, etc., Ins.*

that if the insured is not satisfied with the adjustment, he may bring, or must bring, his suit to a certain court within a certain time, does not apply where the loss was not adjusted.¹ The cause of action arises where the insured died.² Where the policy limited the time of suit to a year after an award should be obtained under its terms, the court intimated, in an action to reform the policy and for a recovery thereon as reformed, that it was doubtful whether the limitation applied, except where an award had fixed the amount of the claim.³ A delay of ten years in bringing suit upon a policy amounts to laches.⁴ But it has been held that there can be no laches short of the period fixed by the statute of limitations.⁵ If the last day of the year, limited for filing suit, is Sunday, the action is in time if begun on the following Monday.⁶

§ 444. **When the Statute of Limitations Applies.** — If no limitation is imposed by the policy the ordinary statutes of limitation apply. In a case where no certificate was issued and the right of the beneficiary of a benefit society

Co. v. Routledge, 7 Ind. 25; *Nute v. Hamilton, etc., Ins. Co.*, 6 Gray, 174; *Amesbury v. Bowditch, etc., Ins. Co.*, *Id.* 596; *Hall v. People's, etc., Ins. Co.*, *Id.* 185; *Matt v. Iowa M. A. Assn.*, 81 Ia. 135; 46 N. W. R. 857.

¹ *Landis v. Home, etc., Ins. Co.*, 56 Mo. 591; *Nevins v. Rockingham M. F. Ins. Co.*, 25 N. H. 22; *Williams v. New England F. Ins. Co.*, 29 Me. 465; *Bartlett v. Union M. L. Ins. Co.*, 46 Me. 500; *Boynton v. Middlesex, etc., Ins. Co.*, 4 Met. 212

² *Bankers L. Ins. Co. v. Robbins*, 53 Neb. 44; 73 N. W. R. 269; 75 N. W. R. 585; 55 Neb. 117. See also as to venue, *Atlanta Acc. Assn. v. Bragg (Ala.)*, 29 S. E. R. 706; *Green v. Eq. Mut. End. L.*, 105 Ia. 628; 75 N. W. R. 635.

³ *Hay v. Star F. Ins. Co.*, 77 N. Y. 235.

⁴ *Northwestern L. Ins. Co. v. Lowry*, 14 Ky. L. R. 600; 20 S. W. R. 607.

⁵ *Stewart v. Grand Lodge, etc.*, 100 Tenn. 267; 46 S. W. R. 579.

⁶ *Owen v. Howard Ins. Co.*, 87 Ky. 571; 10 S. W. R. 119. A valuable note on limitations for time of bringing suit on insurance policies is appended to *Sample v. London, etc., Ins. Co.*, 46 S. C. 491; 24 S. E. R. 334; 47 L. R. A. 690. As to pleading the limitation see *Conn. Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. R. 444

was defined by the laws of the same it was held that the statute of limitations upon actions upon parol agreements applied.¹ In Georgia, however, it was held by the Supreme Court, in a case where the defendant was incorporated for insuring lives, and the charter provided that the amount due at the member's death should be paid in a specified way, that the statute of limitations in regard to enforcement of rights accruing to individuals under statutes, acts of incorporation, or operation of law applied, because the liability was statutory, resting on the defendant's charter.² Where the existence of a policy was concealed from the insured by the agent of the company for over six years, although he had received it to be delivered to the insured, it was held that the force of the statute of limitations could not be avoided by pleading the fraud, since by so doing the plaintiff would be put in the position of suing on a contract consummated by concealed delivery.³ If a policy on the life of the debtor be assigned to the creditor on condition that no steps be taken to collect the debt during the life of such debtor, the statute of limitations will not commence to run against the debt until the death of the debtor.⁴ A company doing business in a State is considered as fully domiciled there for the purpose of being sued and may rely on the statute of limitations.⁵ Where evidence aliunde is necessary to show who is beneficiary the contract is not one in writing and the statute of limitations applicable to such contracts applies.⁶

¹ *Kauz v. Improved Order, etc.*, 13 Mo. App. 341.

² *Georgia Masonic Ins. Co. v. Davis*, 63 Ga. 471.

³ *Morrison v. Ins. Co., etc.*, 64 N. H. 137; 7 Atl. Rep. 378.

⁴ *Damron v. Penn. M. L. Ins. Co.*, 99 Ind. 478.

⁵ *Conn. M. L. Ins. Co. v. Duerson*, 28 Gratt. 630.

⁶ *Railway Passengers', etc., Assn. v. Loomis*, 142 Ill. 560; 32 N. E. R. 434.

§ 445. **When the Limitations do Not Attach: Waiver: Excuses for Not Bringing Suit.** — The right of a member of a mutual company is not affected by a by-law in force when his policy was obtained, unless it is made a part of the policy.¹ And if the delay to bring suit within the designated period is a result to which the company mainly contributed by holding out hopes of amicable adjustment, it will not be allowed to take advantage thereof. The limitation of the policy will also be disregarded if insured is prevented from bringing his suit by fraud or the insurer's holding out reasonable hopes of settlement;² or the agent of the company mislead the assured,³ and the limitation may be waived after the action is legally barred.⁴ Denial of all liability is a waiver if the limitation runs from time of filing proof.⁵ If within the time limited

¹ *Mutual Accident, etc., Ass. v. Kayser*, 14 W. N. C. 86.

² *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Little v. Phoenix Ins. Co.*, 123 Mass. 389; *Home Ins., etc., Co. v. Myer*, 93 Ill. 271; *Martin v. State Ins. Co.*, 44 N. J. L. 485; *St. Paul, etc. v. McGregor*, 63 Tex. 399; *Bish v. Hawkeye Ins. Co.*, 69 Ia. 184; *Solomon v. Metropolitan Ins. Co.*, 16 Jones & Sp. 22; *Curtis v. Home Ins. Co.*, 1 Biss. 485; *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444; *Mickey v. Burlington Ins. Co.*, 35 Ia. 174; *Voorheis v. People's, etc., Soc.*, 91 Mich. 469; 51 N. W. R. 1109; *Dougherty v. Metropolitan L. Ins. Co.*, 3 App. Div. 313; 38 N. Y. Supp. 258.

³ *Jennings v. Metropolitan L. Ins. Co.*, 148 Mass. 61; 18 N. E. R. 601. *Mut. R. F. L. Assn. v. Tolberts (Tex. Civ. A.)*, 33 S. W. R. 295. In the first case the enurement of the advantages of waiver to personal representatives is considered.

⁴ *Coursin v. Penn. Ins. Co.*, 46 Pa. St. 323. For examples of waiver see *Vincent v. Mut. R. F. L. A.*, 74 Conn. 684; 51 Atl. R. 1066; *Robinson v. Metropolitan L. Ins. Co.*, 151 N. Y. 711; 53 N. E. R. 1131; *Magner v. Mu. L.*, 162 N. Y. 657; 57 N. E. R. 1116; affg. 17 App. Div. 13; 44 N. Y. Supp. 862; *Covenant M. L. Assn. v. Baughman*, 73 Ill. App. 544; *Carlson v. Metropolitan L. Ins. Co.*, 172 Mass. 142; 51 N. E. R. 525; *Thomas v. Guaranty, etc., Assn.*, 73 Mo. App. 371; *Mut. R. F. L. Assn. v. Tolhart (Tex. Civ. A.)*, 33 S. W. R. 295; *Mut. Ben. L. Assn. v. Coats*, 48 Ill. App. 185; *Vincent v. Mut. R. F. L. A.*, 74 Conn. 684; 51 Atl. R. 1066.

⁵ *Phillips v. U. S. Ben. Soc.*, 120 Mich. 142; 79 N. W. R. 1. See also *Metropolitan Acc. Assn. v. Froiland*, 161 Ill. 30; 43 N. E. R. 766.

for suit the insurer promise conditionally to pay the amount at a future date, this intervening time is excluded in calculating the period of limitation,¹ or if the acts and omissions of the company delay the insured in making proofs, for say five months, suit on the policy being barred a certain time after loss, this period of five months is to be excluded in computing the time within which action must be brought,² and where the agent agreed to pay as soon as the money was received the limitations were suspended.³ Part payment arrests the running of the limitations.⁴ When, however, all negotiations were ended, two months before the time limited for suit had elapsed, it was held that no excuse existed justifying the court in sustaining an action brought six months after the limit expired;⁵ and mere negotiations are not sufficient to show a waiver of the condition as to time of suit;⁶ nor even a promise to pay, if withdrawn four months before time limited for suit elapsed.⁷ Ignorance of the provision as to limitation in the policy of the time of bringing suit is no excuse, although the policy had not been delivered;⁸ nor is a mistake in the policy as to the time the risk commenced;⁹ nor representations of an agent, the

¹ *Black v. Winnesheik Ins. Co.*, 31 Wis. 74. See also *Modern Woodmen v. Bauersfeld*, 62 Kan. 340; 62 Pac. R. 1012.

² *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472.

³ *Metropolitan L. Ins. Co. v. Dempsey*, 72 Ind. 288; 19 Atl. R. 642.

⁴ *Kentucky Mut., etc. v. Turner*, 89 Ky. 665; 13 S. W. R. 104.

⁵ *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599; *Lewis v. Metropolitan L. Ins. Co.*, 180 Mass. 317; 62 N. E. R. 369.

⁶ *Allemania Ins. Co. v. Little*, 20 Bradw. 431; *Phoenix Ins. Co. v. Lebcher*, *Id.* 450. See also *Fey v. I. O. O. F., etc., Soc. (Wis.)*, 98 N. W. R. 206.

⁷ *Garretson v. Hawkeye Ins. Co.*, 65 Ia. 468.

⁸ *Wilkensen v. First National Ins. Co.*, 72 N. Y. 499. But see *Union Cent. L. Ins. Co. v. Phillips*, 4 C. C. A. 263; 102 Fed. R. 19; *reversg.* 101 Fed. R. 33.

⁹ *Farmers' M. F. Ins. Co. v. Barr*, 98 Pa. St. 345.

policy negating his authority;¹ nor is this condition affected by a waiver of other conditions in the policy;² nor by the non-receipt of a notice of the disallowance of the claim duly mailed;³ nor by the fact that the beneficiaries are minors;⁴ nor is the limitation waived by an offer of compromise;⁵ nor the failure and neglect of the company to adjust the loss;⁶ nor a promise of the insurer to write and inform the insured what the company proposed to do.⁷ Whether war is an excuse for not bringing suit is doubtful. The Supreme Court of the United States has held in the affirmative⁸ but there is authority to the contrary.⁹ And so in regard to the absence of the defendant so that process cannot be served upon him. In such a case the Supreme Court of Michigan¹⁰ held that although the first summons was not served because of the absence of the defendant, a second summons issued after the limit of time had expired, was in time, irrespective of the question whether it was a continuation of the first summons.¹¹ The appointment of a receiver arrests the limitations.¹²

§ 446. **When Time of Limitation Begins to Run.** — A question arising more frequently in cases of fire than of life

¹ *Waynsboro, etc., Ins. Co. v. Conover*, 98 Pa. St. 384.

² *Universal, etc., Ins. Co. v. Weiss*, 106 Pa. St. 20.

³ *Higgins v. Windsor, etc., Ins. Co.*, 54 Vt. 270.

⁴ *O'Laughlin v. Union Central L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280; *Suggs v. Travelers Ins. Co.*, 71 Tex. 579; 9 S. W. R. 676; *Fey v. I. O. O. F., etc., Soc. (Wis.)*, 98 N. W. R. 206.

⁵ *Davis v. Canada, etc., Ins. Co.*, 39 Up. Can. Q. B. 452.

⁶ *Dutton v. Vermont M. F. Ins. Co.*, 17 Vt. 369.

⁷ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Same v. Ætna Ins. Co.*, *Id.* 437.

⁸ *Semmes v. Insurance Co.*, 13 Wall. 158; reversing *s. c.* 36 Conn. 543.

⁹ *Phoenix Ins. Co. v. Underwood*, 12 Heisk. 424. See *ante*, § 356.

¹⁰ *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202.

¹¹ *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136, seems opposed to this view.

¹² *Lehman v. Clarke*, 65 Ill. App. 238.

insurance is when does the time within which a suit must be brought begin to run. The preponderance of authority is to the effect that it dates from the time when an action might first be brought, as, when the loss is payable so many days after proof of loss, from the lapse of this period after the submission of proofs or the adjustment. And this, although by the terms of the contract suit must be brought so many months after the loss should occur.¹ If proofs of loss are waived, the time of limitation dates from the expiration of the same stipulated number of days after such waiver as after proofs.² Where the defendant disclaimed all liability suit still cannot be brought until after the expiration of the period given the company to pay the loss.³ Suit is in time if the summons is issued within the time prescribed though not served so that an alias writ issued later is necessary.⁴

¹ *Ellis v. Council Bluff Ins. Co.*, 64 Ia. 507; *Chandler v. St. Paul etc., Ins. Co.*, 21 Minn. 85; *Hay v. Star F. Ins. Co.*, 77 N. Y. 235; *Mayor, etc., v. Hamilton Ins. Co.*, 39 N. Y. 46; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *Mut., etc., Assn. v. Kayser*, 14 W. N. C. 86; *Barber v. F. & M. Ins. Co., etc.*, 16 W. Va. 658; *Spare v. Home Mut. Ins. Co.*, 9 Sawy. 142; 17 Fed. Rep. 568; *Friezen v. Allemania Ins. Co.*, 30 Fed. Rep. 352; *Mihler v. Hartford F. Ins. Co.*, 70 Ia. 704; 29 N. W. Rep. 411; *Owen v. Howard Ins. Co.*, 9 Ky. L. Rep. 147. To the contrary are *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Humboldt Ins. Co. v. Johnson*, 91 Ill. 92; 1 Bradw. 309; *Kettenbach v. Omaha L. Assn.*, 49 Neb. 842; 69 N. W. R. 135; *Bloodgood v. Mass. Ben. L. Assn.*, 19 Misc. 460; 44 N. Y. Supp. 563; *Standard L. & A. Assn. v. Davis*, 59 Kan. 521; 53 Pac. R. 856.

² *Eggleston v. Council Bluff Ins. Co.*, 65 Ia. 308.

³ *McConnell v. Iowa Mut. Aid. Assn.*, 79 Ia. 757; 43 N. W. R. 189; *Thompson v. Iowa M. A. Assn.*, 81 Ia. 135; 46 N. W. R. 857; *Cooper v. Mutual Acc. Assn.*, 132 N. Y. 334; 30 N. E. R. 832; affg. 10 N. Y. 748.

Everett v. Niagara Ins. Co., 142 Pa. St. 322; 21 Atl. R. 817; *Standard L. & Acc. Assn. v. Askew*, 11 Tex. Civ. A. 59; 32 S. W. R. 31. But the contrary is true if statutory provisions make service the beginning of a suit. *Modern Woodmen v. Bauersfeld*, 62 Kan. 340; 62 Pac. R. 1012.

§ 447. **Condition of Limitation, how Taken Advantage of.** — The proper practice is to plead the contract limitation, and not to attempt to take advantage of it by demurrer,¹ and if the suit is not commenced within the stipulated time, the fact is sufficiently pleaded by an allegation that the conditions of the policy have not been complied with.² If the answer, after setting forth the conditions of the policy, avers that more than the stipulated number of months have elapsed since the making of any claim for loss, it will be sufficient to enable defendant to avail itself of the defense that the suit was not brought within the prescribed time.³ The objection that the action was not brought in time cannot be raised by plea in abatement;⁴ nor can it be set up, if, having been interposed by plea, a demurrer has been sustained to it;⁵ nor after verdict.⁶

§ 448. **Condition of Limitation on Time of Bringing Suit not Usual in Life Insurance Policies: Construction.** — This condition, limiting the time within which an action is to be brought on the policy, is not as usual in fire as in life insurance contracts. We have referred to the subject briefly, endeavoring to concisely state general principles without elaboration or argument, because the cases relate almost entirely to fire insurance policies. By analogy the reasoning found in these precedents applies to life insurance contracts. The cases all show that in con-

¹ *Barber v. F & M. Ins. Co., etc.*, 16 W. Va. 658; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 136.

² *O'Laughlin v. Union Central L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280. This rule, however, may be modified by statute or local requirements and cannot be taken as applying in all cases.

³ *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594.

⁴ *Smith v. Atlantic, etc., Ins. Co.*, 1 Brun. Coll. Cas. 573; 12 L. R. 408.

⁵ *Humboldt Ins. Co. v. Johnson*, 1 Bradw. 309.

⁶ *Caldwell v. Stadacona, etc., Ins. Co.*, 3 Russ. & G. (Nova S.) 218.

struing the language of this stipulation, the same rules are observed as interpreting other conditions of the policy; it is construed liberally in favor of the assured and strongly against the insurer. If by a strict construction the rights of the assured can be preserved the courts will adopt this course.

§ 449. Conditions Concerning Arbitration Seldom Found in Life Insurance Policies. — It is usual in policies of fire insurance to insert conditions and provisions in regard to arbitration if any loss arises. It has often been a disputed question whether such provisions were valid and binding, and numerous decisions have been made construing these stipulations. Such clauses in life policies are comparatively infrequent, although they are found in some contracts. With benefit societies it is not uncommon for the laws of the society to provide for a tribunal of its own to settle differences between its members and determine its liability in regard to claims.¹ It will not be necessary for us to enter into an examination of the cases that have been decided involving the validity of arbitration clauses in fire policies except so far as they relate indirectly to the rights of those who belong to benefit societies.

§ 450. Agreements to Refer to Future Arbitration, When and to What Extent Valid. — It is a settled principle of law that parties cannot by contract oust the courts of their jurisdiction and agreements to refer to future arbitration will not be enforced in equity and will not be sustained as a bar to an action at law or a suit in equity. “The reason generally given,” says the Supreme Court of Massachusetts,² “is, that such an agreement affects the remedy,

¹ See *ante*, § 400a.

² *Reed v. Washington Ins. Co.*, 138 Mass. 575; *German-Am. Ins. Co. v. Etherton*, 25 Neb. 505; 41 N. W. R. 406.

and, if enforced, would oust the courts of their jurisdiction. Another reason is, that a submission to arbitration is a power, and revocable at any time before it is fully executed by an award made. A party will not be compelled to enter into a submission which he can forthwith revoke; and the bringing of an action amounts to a revocation. Neither of these reasons seems to apply to an action upon a promise to pay an award. Such a promise is conditional upon the making of an award, and the arbitration is a condition to the right of action.” It is well settled, that an agreement in a policy to refer all matters of dispute to arbitrators is void and ineffectual.¹ But it is also a well-settled principle of law that, although parties cannot by contract oust the courts of their jurisdiction any person may covenant that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the contract.² A condition in any contract to refer any question which may arise out of it to arbitration, will be, if so stated, a condition precedent to the right to sue on the contract, but unless the condition expressly stipulates that, until arbitration be had, no action shall be brought, its performance is not precedent to the right to sue on the contract.³ The correct view is thus stated by Lord Coleridge in *Dawson v. Fitzgerald*⁴ as having been laid down in a previous case: ⁵ “If two persons, whether in the same or in a different deed from that which creates the liability

¹ *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 70; *Trott v. City Ins. Co.*, 1 Cliff. 439; *Cobb v. New England, etc., Ins. Co.*, 6 Gray, 192; *Insurance Co. v. Morse*, 20 Wall. 445.

² *Scott v. Avery*, 5 H. of L. Cas. 811; 25 L. J. Ex. 303; 2 Jur. (N. S.) 815; affirming 8 Ex. 487; 22 L. J. Ex. 287; 17 Jur. 810; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478.

³ *Roper v. London*, 1 El. & El. 825; 28 L. J. Q. B. 260; 5 Jur. (N. S.) 491; 7 W. R. 441; *Elliott v. Royal Exchange, etc.*, 2 L. R. Ex. 237; 36 L. J. Ex. 129; 16 L. T. 399; 15 W. R. 907.

⁴ 1 Ex. D. 257; 45 L. J. Ex. 893; 35 L. T. 220; 24 W. R. 773.

⁵ *Elliott v. Royal Exchange, supra*.

agree to refer the matter upon which the liability arises, to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained.”¹ In insurance, agreements to submit matters in controversy to arbitration are generally invalid when they go to the root of the controversy and involve questions of law as well as of fact,² or when they determine the liability of the company. But if the matters to be submitted are incidental, special, or collateral to the main question or liability, as, for example, the amount of the loss or manner of its payment, then the agreement to refer will be upheld. The right can be waived.³ The subject is not without difficulty and decisions are not always in harmony, but the rule is practically as stated. As said before the question arises more frequently in fire insurance cases, but is likely to occur in the experience of life insurance companies and benefit societies. If the promise to pay is on condition that the amount be ascertained by arbitrators, then the arbitration is a condition precedent to recovery, and performance or waiver must be shown. We refer below to the principal cases where the point has been raised and the language of various stipulations construed. In some a condition precedent has been held to exist and be valid, while in others the agreement has been considered ineffectual.⁴ The Supreme Court of the

¹ *Wood v. Humphrey*, 114 Mass. 185; *Rowe v. Williams*, 97 Mass. 163.

² *Alexander v. Campbell*, 41 L. J. Ch. 478; 27 L. T. 25; *Smith v. Preferred M. Acc. Assn.*, 51 Fed. R. 520.

³ *Gau v. Masons, etc., Assn.*, 109 Mich. 527; 67 N. W. R. 546.

⁴ In the following cases the agreement to refer was upheld as a condition precedent to suit: *Old Saucelito, etc., Co. v. Commercial Union Ass.*

District of Columbia, in the case of *Campbell v. Am. Popular L. Ins. Co.*,¹ considered the subject fully and sustained a provision in a life policy that the company should not be liable, if in the opinion of its surgeon-general, the death of the insured was caused by intemperance; but in that event should only be held to refund the premiums already paid. The court admitted the doctrine that in general the jurisdiction of the courts could not be ousted by an agreement of the parties to refer future differences to arbitrators, but after a review of the authorities held that this was only the reference of a collateral or special fact, and a condition precedent to recovery. And it is competent for the laws of an association to provide that should total disability result from other than certain specified causes it shall not create a legal liability but the claimant shall be

Co., 66 Cal. 253; *Adams v. South British, etc., Co.*, 70 Cal. 198; 11 Pac. Rep. 627; *Carrol v. Girard F. Ins. Co.*, 72 Cal. 297; 13 Pac. R. p. 863; *Gauche v. London, etc., Ins. Co.*, 4 Woods, 102; 10 Fed. Rep. 347; *Davenport v. Long Island Ins. Co.*, 10 Daly, 535; *Cin. Coffin Co. v. Home Ins. Co.*, 7 Cin. L. B. 342; *Flaherty v. Germania Ins. Co.*, 1 W. N. C. 352; *Calvin v. Provisional Ins. Co.*, 27 Up. Can. Q. B. 403; *McInnes v. Western Co.*, 30 Up. Can. Q. B. 580; *Lantalum v. Anchor M. Ins. Co.*, 22 N. B. 14; *Minifie v. Railway, etc., Co.*, 44 L. T. 552. In the following cases the agreement has been held invalid as not being a condition precedent: *Gere v. Council Bluffs Ins. Co.*, 67 Ia. 272; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *German-Am. Ins. Co. v. Seiger*, 109 Ill. 254; *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419; *Crossley v. Can. F. Ins. Co.*, 27 Fed. Rep. 30; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; *Allegre v. Maryland F. Ins. Co.*, 6 H. & J. 408; affirmed 6 G. & J. 136; 14 Am. Dec. 289 and note; *Liverpool L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Kill v. Hollister*, 1 Wils. 129; *Mark v. National Ins. Co.*, 24 Hun, 565; 91 N. Y. 663; *Wallace v. German-American Ins. Co.*, 1 McC. 335; 2 Fed. Rep. 638, 4 McC. 123; *Commercial Union Ass. Co. v. Hocking*, 19 W. N. C. 213; *Nurney v. Firemen's Ins. Co.*, 63 Mo. h. 633; 30 N. W. Rep. 350; *Gorman v. Hand-in-hand Ins. Co.*, 11 Irish C. L. 224; *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 25 Pac. R. 629. See *May on Ins.*, § 492, *et seq.*

¹ 1 McA. 246; 2 Big. L. & A. I. Cas. 16. But to the contrary is *Supreme Council, etc. v. Forsinger*, 125 Ind. 52; 25 N. E. R. 129; and also *Chicago, B. & Q. R. Co. v. Volson (Neb.)*, 97 N. W. R. 831.

allowed an amount approved by the beneficiary board as a part of the systematic benevolence of the society.¹ The provisions in laws of benefit societies creating a tribunal to pass upon the claims of their members have in several instances been enforced as conditions precedent to recovery. In one² the court upheld a stipulation in the laws of a society that all claims against the association should be referred to the board of directors and that a majority of the board should decide all questions of dispute and doubt and that their decision should be final. The court says: "It was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the association should be final."³ But this case has been severely criticised by the Supreme Court of Illinois,⁴ and the weight of authority remains that the parties by agreement can not oust the courts of their jurisdiction.⁵

¹ *Pool v. Brotherhood Ry. Trainmen* (Cal.), 77 Pac. R. 661.

² *Rood v. Railway Passengers', etc., Assn.*, U. S. Cir. Ct. N. D. Ill., 31 Fed. Rep. 62.

³ See *Canfield v. Great Camp, etc.*, 87 Mich. 626; 49 N. W. R. 875; *Hembeau v. Great Camp, etc.*, 101 Mich. 161; 59 N. W. R. 417; *Coffee v. Southwark Ben. Soc.*, 2 W. N. C. 600; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Van Poucke v. Netherland, etc., Soc.*, 63 Mich. 378; 29 N. W. Rep. 863; *Fillmore v. Great Camp, etc.*, 103 Mich. 437; 61 N. W. R. 785; 66 N. W. R. 675; *Cotter v. Grand Lodge, etc.*, 23 Mont. 82; 57 Pac. R. 650; *Russell v. N. Am. Ben. Assn. (Mich.)*, 70 N. W. R. 137; and *ante*, § 94.

⁴ *Railway Passenger, etc., Assn. v. Robinson*, 147 Ill. 138; 35 N. E. R. 168; *Burlington, etc., Assn. v. White*, 41 Neb. 547; 59 N. W. R. 747. See also *Ry. Passenger, etc., Assn. v. Tucker*, 157 Ill. 194; 42 N. E. R. 398.

⁵ *Kinney v. B. & O. Employe's R. Assn.*, 35 W. Va. 385; 14 S. E. 8; *Whitney v. National Masonic, etc., Assn. (Ia.)*, 54 N. W. R. 184; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; 37 Pac. R. 245; *Grimbley v. Harrold*, 125 Cal. 24; 57 Pac. R. 558; *National Masonic Acc. Assn. v. Burr*, 44 Neb. 256; 62 N. W. R. 466; *McMahon v. Supreme Tent, etc.*, 151 Mo. 522; 52 S. W. R. 384; *Prader v. National Mas. Acc. Assn.*, 95 Ia. 149; 63 N. W. R. 601; *Supreme Lodge, etc. v. Raymond*, 57 Kan. 647;

If the claim is submitted the claimant may be bound as by an award.¹

§ 450a. **Exhausting Remedies Within the Order.**— We have already referred to the provisions usually found in the laws of fraternal benefit societies, requiring a submission of disputes to a tribunal created for the purpose of determining controversies with the order and providing that the decision of such tribunal shall be final, subject to an appeal to superior bodies of the same organization.² The courts have often been called upon to determine what is meant by the requirement that a member must exhaust his remedies in the order before resorting to the civil courts. We have seen that, while some authorities, as for example those of Michigan, have held to be valid by-laws providing that the decision of the tribunal of the order shall be final, the weight of authority is in favor of the proposition that a society cannot by its contract with a member, oust the courts of their jurisdiction. A distinction seems to be made between controversies between the member and the society, or internal controversies, and claims of the beneficiaries of deceased members or outsiders. It has been held,³ that such requirements in the by-laws apply to controversies between the member and the society. Such provisions will be construed strictly, and the right of resort to the courts will not be deemed to be taken away by mere inference; and, if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit

47 Pac. R. 533; 49 L. R. A. 373; *Voluntary Relief, etc. v. Spencer*, 17 Ind. App. 123; 46 N. E. R. 477; *B. & O., etc., Assn. v. Standard*, 56 Ohio St. 224; 46 N. E. R. 577; 49 L. R. A. 387 and note. See also *ante*, §§ 94 and 400a.

¹ *Robinson v. Templar Lodge*, 97 Cal. 62; 31 Pac. R. 609.

² *Ante*, §§ 107, 400a and 450.

³ *Maxwell v. Family Protective Union*, 115 Ga. 475; 41 S. E. R. 552. See also *Burlington, etc. v. White*, 41 Neb. 547; 59 N. W. R. 747.

terms, and the exhausting of the remedies in the order will be regarded only as a condition precedent to suit.¹ Where the obstacles to the prosecution of an appeal in a benevolent association are so great as to amount almost to a denial of justice, and where, if prosecuted, no relief would result therefrom, a by-law requiring such an appeal before suit is no bar to an action.² It has been held also,³ that such a by-law is waived where the society denies its liability. Ordinarily, however, recourse cannot be had to the courts when the laws of the association unequivocally provide a remedy which the parties have agreed for the grievance complained of, and which has not been pursued and exhausted.⁴ And where the provision for an appeal is only permissive, the member need not pursue the remedy further.⁵

§ 451. **Pleading in Actions on Insurance Contracts.** — The modern codes have largely stripped pleading of its technical character and even in States where common-law forms are retained they are modified by statute. It is not

¹ *Supreme Lodge, etc. v. Raymond*, 57 Kans. 647; 47 Pac. Rep. 533; 49 L. R. A. 373; *B. & O. R. R. Co. v. Stankard*, 56 Ohio St. 224; 46 N. E. R. 477; 49 L. R. A. 381.

² *Brown v. Supreme Court I. O. F.*, 176 N. Y. 132; 68 N. E. R. 145; *Harris v. Wilson*, 86 Mo. App. 406; *Colley v. Wilson*, 86 Mo. App. 396; *Lillie v. Brotherhood, etc.*, 114 Ia. 252; 86 N. W. R. 279; *Eighmy v. Brotherhood, etc.*, 113 Ia. 681; 83 N. W. R. 1051; *Mullen v. Order of Foresters*, 70 N. H. 327; 47 Atl. Rep. 257.

³ *Wuerfler v. Trustees, etc.*, 116 Wis. 19; 92 N. W. R. 433.

⁴ *Levy v. Order, etc.*, 67 N. H. 593; 38 Atl. Rep. 18; *Oliver v. Hopkins*, 144 Mass. 175; 10 N. E. R. 776; *Jeane v. Grand Lodge*, 86 Me. 434; 30 Atl. Rep. 70; *Wood v. Lodge, etc.*, 20 R. I. 795; 38 Atl. Rep. 895; *Ocean Castle, etc. v. Smith*, 58 N. J. L. 545; 33 Atl. Rep. 849; *Whitty v. McCarthy*, 20 R. I. 792; 36 Atl. Rep. 129; *Green v. Board of Trade*, 174 Ill. 585; 51 N. E. R. 599; 49 L. R. A. 365; *Ryan v. Cudahy*, 157 Ill. 108; 41 N. E. R. 760; 49 L. R. A. 353, where a valuable note is appended. *Holomany v. National, etc.*, 39 App. Div. 573; 57 N. Y. Supp. 720; *Kumle v. Grand Lodge*, 110 Cal. 204; 42 Pac. Rep. 634.

⁵ *Supreme Lodge v. Dey*, 58 Kans. 283; 49 Pac. Rep. 74.

within the scope of this work to lay down anything more than general rules for pleadings in suits on life policies and even these general rules must not always be implicitly relied on, for local statutes may change or even abolish what has been established in the adjudications of the courts. The manner of declaring on policies of insurance has in many States been prescribed by statute with a view of simplifying the pleadings and taking away many technical requirements. We have not considered it necessary to discuss the local statutes, but leave it to the practitioner to acquaint himself with the rules which prevail in his own State.

§ 452. **Parties to Actions on Insurance Contracts.** — Where the policy is payable to the assured, “his executors, administrators or assigns,” for the express benefit of the wife of the assured and their children, the executrix is the proper person to sue.¹ A husband who has insured his life for the benefit of his wife, on the failure of the company, may maintain an action in his own name to recover the premiums he has paid.² If a certificate of membership issued by a mutual association expressly covenants to pay to a person named in it, such person not being a member, a sum certain in event of the death of the member to whom the certificate is issued, the beneficiary may be considered the covenantee, and is entitled to sue the company in covenant for the amount specified in the certificate.³ And one for whose benefit a promise is made may sue upon it, though he is not privy to it.⁴ In an action at law on a

¹ *Mass. M. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Grattan v. National L. Ins. Co.*, 15 Hun, 74; *Fairchild v. N. Eastern M. L. Assn.*, 51 Vt. 613; *Stowe v. Phinney*, 78 Me. 244; *Catland v. Hoyt*, 78 Me. 355; *Conn. L. Ins. Co. v. Luchs*, 108 U. S. 498. See also as to parties *ante*, §§ 396, 400.

² *Universal L. Ins. Co. v. Cogbill*, 30 Gratt. 72; *New York L. Ins. Co. v. Bonner*, 11 Neb. 169; *Abell v. Penn. M. L. Ins. Co.*, 18 W. Va. 400.

³ *York County, etc., Assn. v. Meyers*, 11 W. N. C. 541.

⁴ *Barbaro v. Occidental Grove, etc.*, 4 Mo. App. 429; *Beardslee v. Morgner*, *Id.* 139.

policy by an administrator one claiming such policy under an assignment is an indispensable party.¹ And a party having possession of a policy on the life of his intestate can take out letters of administration and sue, although the insured did not die in the State and left no property therein.² The widow and children can sue on a policy payable to the husband and father, it being alleged that there were no debts and no administration.³ And a trustee can bring suit.⁴ In Massachusetts, prior to a recent statute,⁵ where the contract of the society was with the member to pay to a third party, the administrator or executor of the member was the proper party to sue.⁶ And that even though the certificate was payable to one not competent to be a beneficiary.⁷ If a policy or certificate of a benefit society, provide for the payment of different sums to different parties, it is improper for the beneficiaries to join in one action to recover the several sums due, but each must bring a separate action for his share.⁸ In such case the covenant in terms is joint, but if the interest be several the covenant will be several, although the

¹ *New York Life Ins. Co. v. Smith*, 14 C. C. A. 635; 67 Fed. R. 694; 29 U. S. App. 220. As to other questions as to necessary parties see *Voss & Conn. M. L. Ins. Co.*, 19 Mich. 161; *Pray v. Life Ins. Co.*, 104 Ia. 114; 73 N. W. R. 485; 44 L. R. A. 689; 77 N. W. R. 697.

² *Page v. Life Ins. Co.*, 131 N. C. 115; 42 S. E. R. 543. As to suit by husband on policy payable to deceased wife see *D'Arcy v. Conn. M. L. Ins. Co.*, 108 Tenn. 567; 69 S. W. R. 768.

³ *Sun Life Ins. Co. v. Phillips (Tex. C. A.)*, 70 S. W. R. 603.

⁴ *Pfeifer v. Supreme Lodge, etc.*, 173 N. Y. 418; 66 N. E. R. 108; reversg. 74 App. Div. 630; 77 N. Y. Supp. 1138.

⁵ *Dean v. Am. Legion of Honor*, 156 Mass. 435; 31 N. E. R. 1.

⁶ *Rindge v. Society*, 146 Mass. 286; 15 N. E. R. 628; *Flynn v. Mass. Ben. Soc.*, 152 Mass. 288; 25 N. E. R. 716. See also *Brown v. Greenfield L. Assn.*, 172 Mass. 498; 53 N. E. R. 129.

⁷ *Burns v. Grand Lodge, etc.*, 153 Mass. 173; 26 N. E. R. 443.

⁸ *Campbell v. National Life Ass. Co.*, 34 Up. Can. Q. B. 35; *Frazer v. Phoenix M. L. Ins. Co.*, 36 Up. Can. Q. B. 422; *Keary v. Mut. Reserve F. L. Assn.*, 30 Fed. Rep. 359.

terms of it be joint. "The rule is clearly established, that though a man covenants with two or more persons, using words which *prima facie* import a joint covenant, yet, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an account for his particular damage."¹ But if the amount of the insurance be payable to certain persons equally, there may be a different rule.² An administrator cannot maintain an action on a contract to pay to the heirs of his intestate,³ nor can a wife, neither executor or assignee, sue on a policy payable to her husband;⁴ but where a resulting trust follows for the benefit of the heirs at law, the administrator can sue.⁵

§ 453. **Actions on Benefit Certificates and Against Benefit Societies for Benefits: Measure of Damages in Actions at Law.**—The certificates of benefit societies differ greatly in form and the styles of action and method of pleading must be determined by the language of the contract in each case. In some societies the certificate issued by the supreme authority, almost always a corporation, is to pay a certain amount to the designated beneficiary upon the death of the member. Where this is the case the certificate is in legal effect a policy of life insurance, governed by the rules of pleading applicable to ordinary actions on policies.⁶ The certificates issued

¹ Lane v. Drinkwater, 1 C. M. & R. 612; James v. Emery, 8 Taunt. 245.

² Covenant M. Ben. Assn. v. Hoffman, 110 Ill. 603.

³ Bomasch v. Supreme Sitting, etc., 42 Minn. 241; 44 N. W. R. 12.

⁴ New York L. Ins. Co. v. Jack, 76 Miss. 788; 25 Sou. R. 871.

⁵ Bishop v. Empire Order, etc., 112 N. Y. 627; 20 N. E. R. 562. But see Britton v. Supreme Council, etc., 46 N. J. E. 102; 18 Atl. R. 675.

⁶ Elkhart M. B. & A. Assn. v. Houghton, 98 Ind. 149; *post*, § 454.

by other societies provide that upon the death of the member, the company shall only pay over the proceeds of certain assessments, not to exceed a stipulated amount. In such cases it is not entirely agreed what remedy is most proper, if the association, denying its liability, refuses to levy the promised assessment, for the authorities are not in harmony. On principle it seems clear that an unincorporated voluntary association cannot be sued at law as an entirety for promised benefits, but the proceedings should be in equity,¹ and in this section, whenever actions at law against benefit societies are mentioned, it will be understood that such societies are incorporated. If the contract so provide the society can only be sued in equity on its certificate.² It has been questioned whether, if a benefit association can be sued at law for failure to levy an assessment as provided in its certificates, recovery can be for more than nominal damages. And in Iowa the Supreme Court has been positive in its rulings to the effect that only nominal damages can be recovered in such actions,³ holding that if an action be brought at law for damages for refusal to levy an assessment, the measure of damages is not the maximum sum called for in the certificate, but nominal damages only can be recovered.⁴ In the United States Circuit Court in Missouri a different rule has been laid down and in an action on a certificate of a company it was held that recovery should be for the full amount,

¹ *Paul v. Keystone Lodge*, 3 W. N. C. 408; *Van Houten v. Pine*, 36 N. J. Eq. 133.

² *Eggleston v. Centennial M. L. Assn.*, 5 McC. 484; 18 Fed. Rep. 14; 19 Fed. Rep. 201.

³ *Bailey v. Mutual Ben. Assn.*, 41 Ia. 689; 27 N. W. Rep. 770; *Rainsbarger v. Union Mut. A. Assn.*, 72 Ia. 191; 38 N. W. Rep. 626; *Garretson v. Equitable, etc., Assn.*, 74 Ia. 419; 38 N. W. Rep. 127. See also *Curtis v. Mut. Ben. L. Co.*, 48 Conn. 98; *Van Houten v. Pine*, 36 N. J. Eq. 133.

⁴ *Tobin v. Western Mut. Aid Soc.*, 72 Ia. 261; 33 N. W. Rep. 662. See *Kaw Valley L. Assn. v. Lemke*, 40 Kan. 142; 19 Pac. 337.

unless defendant proved that an assessment would not produce the full sum.¹ If the petition alleged that the society had collected the assessment and refused to pay it over, then recovery would certainly be for the full amount.² It has been maintained that the most effectual remedy on the certificate of a benefit society is by proceedings in equity, and in a case of this kind the Supreme Court of Illinois said: ³ “As the corporation is not organized for pecuniary profit, has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in by assessment for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy by directing a specific performance of the contract of the defendant by the levying of the proper assessments.”⁴ The decided preponderance of authority is in favor of the view that an action at law can be maintained against the society for a refusal or neglect to make the assessment. It is its duty to make the assessment and for the breach of this duty, imposed by the contract, if injury has resulted to the beneficiary, a court of law is the most appropriate tribunal to afford him relief. The declaration, among other averments, must charge a failure or refusal to make the assessment, that if such assessment had been duly made it would have resulted in the collection of the full amount called

¹ *Lueders v. Hartford L. & A. Ins. Co.*, 12 Fed. Rep. 465. See also *Supreme Council, etc. v. Anderson*, 61 Tex. 296; *Elkhardt M., etc., Assn., v. Houghton*, 103 Ind. 286.

² *Smith v. Covenant M. B. A.*, 24 Fed. 685.

³ *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108.

⁴ See *Van Houten v. Pine*, 36 N. J. E. 133, *supra*.

for by the certificate, and claim that sum for damages for such failure or refusal. If either of these averments is omitted the declaration or petition is fatally defective.¹ But if the contract provides that if the proceeds of an assessment prove insufficient to pay the full amount of the certificate it shall be payable from the accumulated surplus, no averment or proof need be made of the number of members,² and so where the statute provides that the policy issued by an assessment company shall

¹ *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465; 12 Atl. Rep. 884; *Elkhart v. M. Aid, etc., Soc. v. Houghton*, 103 Ind. 286; *Taylor v. National Temperance R. Union*, 94 Mo. 35; 6 S. W. Rep. 71; *Curtis v. Mut. Ben. L. Co.*, 48 Conn. 98; *Suppiger v. Covenant M. B. Ass.*, 20 Bradw. 595; *Neekern v. N. W. End. Assn.*, 30 Minn. 406; *O'Brien v. Home Ben. Soc.*, 46 Hun, 426; *Darrow v. Family Fund Soc.*, 42 Hun, 245; *Freeman v. National Ben. Soc.*, *Id.* 252; *Burland v. N. Western Mut. Ben. Ass.*, 47 Mich. 424; *Excelsior M. Aid Assn. v. Riddl*, 91 Ind. 84; *Ball v. Granite State, etc., Assn.*, 64 N. H. 291; 9 Atl. Rep. 103; *Kansas Prot. Union v. Whitt*, 36 Kan. 761; 14 Pac. Rep. 275; *Deardorff v. Guaranty, etc., Assn.*, 89 Cal. 599; 27 Pac. R. 158; *Mut. Acc. Assn. v. Tuggle*, 138 Ill. 428; 28 N. E. R. 1066; *Herndon v. Triple Alliance*, 45 M. A. 426; *Lawler v. Murphy*, 58 Conn. 294; 20 Atl. R. 457; *Reynolds v. Acc. Assn.*, 1 N. Y. Supp. 738; *Jackson v. Mut. R. Assn.*, 73 Wis. 507; 41 N. W. R. 708; *Bentz v. N. W. Aid Assn.*, 40 Minn. 202; 41 N. W. R. 1037; *O'Brien v. Home Ben. Assn.*, 117 N. Y. 310; 22 N. E. R. 954; *Cram v. Equitable, etc., Assn.*, 11 N. Y. Supp. 462; *Reed v. Ancient Order, etc. (Idaho)*, 69 Pac. R. 127; *Braun v. Maine Ben. L. Assn.*, 92 Me. 341; 42 Atl. R. 500. As to who can sue for funeral benefits, *Sleight v. Supreme Council, etc. (Ia.)*, 96 N. W. R. 1100. As to interest, *Himmelein v. Supreme Council, etc. (Cal.)*, 33 Pac. R. 1130. See as to amount of recovery, *Hart v. National Mas. A. Assn. (Ia.)*, 70 N. W. R. 508; *Great Western, etc., Assn. v. Colmar*, 7 Colo. App. 275; 43 Pac. R. 159; *Robyn v. Supreme Sitting, etc.*, 55 Mo. App. 198; *Lake v. Minn. Mas., etc., Assn.*, 61 Minn. 96; 63 N. W. R. 261; *Peoples M. B. Soc. v. McKay*, 141 Ind. 415; 40 N. E. R. 910; 39 N. E. R. 231; *Congower v. Eq. Mut., etc., Assn.*, 94 Ia. 499; 63 N. W. R. 192; *Sourwine v. Supreme Lodge, etc.*, 12 Ind. App. 447; 40 N. E. R. 646; *Redmond v. Association*, 150 N. Y. 167; 44 N. E. R. 769; *Thennen v. Iowa, etc., Assn.*, 101 Ia. 558; 37 L. R. A. 587; 70 N. W. R. 712; *Wood v. Farmer L. Assn. (Ia.)*, 95 N. W. R. 226.

² *Warner v. National L. Assn.*, 100 Mich. 157; 58 N. W. R. 667.

state the exact amount to be paid.¹ The Supreme Court of Iowa has said that, if a society refuses to levy an assessment upon its members to pay the agreed amount to the beneficiary of a deceased member, the proper remedy is by a proceeding to compel the association to make the assessment,² but this view is not in harmony with the weight of authority. *Mandamus* is wholly inapplicable to such a case.³ Even after judgment, execution on which is returned unsatisfied, it is questionable if *mandamus* to compel the officers of the defendant society to levy an assessment on its members to pay it will lie, but sequestration proceedings is the proper remedy.⁴ After a general judgment on a benefit certificate execution cannot be limited to a particular fund,⁵ and that in spite of a stipulation to the contrary.⁶ The assessments paid into the treasury of benefit society by its members become the property of the society and the members have no further claim or right to it;⁷ and a member of the association, having no interest in the fund, cannot maintain a suit to enjoin its payment.⁸ If an assessment does not produce the amount of the certificate *mandamus* will not lie to compel the society to make up the deficit,⁹ but if it be shown

¹ *McFarland v. U. S. Mut. Acc. Ass.*, 124 Mo. 204; 27 S. W. R. 436.

² *Rainsbarger v. Union Mut. Aid Assn.*, 72 Ia. 191; 33 N. W. Rep. 626; *Bosworth v. Western M. Aid Soc.*, 75 Ia. 582; 39 N. W. R. 903; *Brown v. Grand Council, etc.*, 81 Ia. 400; 46 N. W. R. 1086.

³ *Excelsior M. Aid Assn. v. Riddle*, 91 Ind. 84; *Burland v. Western M. Ben. Assn.*, 47 Mich. 424.

⁴ *Miner v. Trustees, etc.*, 65 Mich. 84; 31 N. W. Rep. 763.

⁵ *Seitzinger v. New Era L. Assn.*, 111 Pa. St. 557; *McKnight v. Mut. L. Assn.*, 15 W. N. C. 400.

⁶ *Peoples Mut. Ben. Soc. v. Werner*, 6 Ind. App. 614; 34 N. E. R. 105.

⁷ *Swett v. Citizens' M. Relief Soc.*, 78 Me. 541; *York County Mut. Aid Ass. v. Myers*, 11 W. N. C. 541; *Brown v. Orr*, 112 Pa. St. 233.

⁸ *Elsey v. Odd-fellows M. R. Soc.*, 142 Mass. 224; 7 N. East. Rep. 844.

⁹ *People, etc. v. Masonic, etc., Assn.*, 126 N. Y. 615; 27 N. E. R. 1037; reversing 12 N. Y. Supp. 171.

that the association wrongfully refused to levy an assessment which if made at the proper time would have realized enough to pay the claim in full it is proper for a decree to provide that an assessment shall be made and if it fails to produce enough to meet the judgment the society shall make up the deficit.¹ It has been said,² that a claim against a benefit association bears interest from the time of the demand, and interest has often been allowed,³ but this is not the invariable rule.⁴ Under the Texas statute a benefit society is not liable to damages as therein provided for non-payment of the amount of the certificate.⁵

§ 453a. **Service of Process on Foreign Corporations.** — The statutes of the different States usually provide that, as a condition precedent to doing business in the State, foreign corporations shall file with the proper official of such State, a consent that service of process in all actions against the corporation shall, if made upon the designated official or person named for the purpose, be deemed personal service. As a corporation has no absolute right to do business outside the State of its domicile without the consent, express or implied, of the State where it desires to do business the latter may give such consent upon such terms as it may see fit to impose.⁶ As a general rule, the

¹ *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; 25 N. E. R. 642. But see *Lindsey v. Western Mut. Aid Soc.*, 84 Ia. 734; 50 N. W. R. 29, modifying *Newman v. Covenant M. B. Assn.*, 76 Ia. 56; 40 N. W. R. 87, in which it is said that it is proper to enter a decree ordering the society to levy an assessment but not to order it to collect by legal process or make good deficiencies.

² *Supreme Lodge v. Zuhlke*, 129 Ill. 298.

³ *Supreme Council, etc. v. Franke*, 137 Ill. 118; 27 N. E. R. 86; *Perine v. Grand Lodge, etc.*, 51 Minn. 224; 53 N. W. R. 367; *Himmelein v. Sup. Council, etc. (Cal)*, 33 Pac. 1180.

⁴ *Courtney v. U. S. Masonic, etc., Assn. (Ia)*, 53 N. W. R. 238.

⁵ *Supreme Council, etc. v. Larmour*, 81 Tex. 17.

⁶ *Ante*, § 56a.

method prescribed for service must be strictly pursued,¹ although it has been held that this method of service does not preclude service in the manner generally prescribed for service on foreign corporations.² It has been held that service is good, although the company has withdrawn from the State and attempted to revoke its power of attorney;³ and the cancellation by the insurance commissioner of the license to do business in the State does not render service on such officer insufficient upon a cause of action which arose out of transactions between parties while the insurance company was carrying on business in such State under the license.⁴ Service is good enough even though a different officer is designated for service by a law subsequently passed.⁵ and in suits on contracts made without the State.⁶ It has also been held that, by doing business in a State, although not authorized to do so, having never complied with the statutory requirements, the company consents that service under the statute may be valid.⁷ Service, however, will not be good

¹ *Old Wayne, M. L. A. v. Flynn* (Ind. App.), 66 N. E. R. 57; *Farmer v. National L. Assn.*, 50 F. d. Rep. 829.

² *Connecticut Mut. L. Ins. Co. v. Spratley*, 99 Tenn. 322; 14 L. R. A. 442; 42 S. W. R. 145; affirmed 172 U. S. 602; *Mutual Reserve Fund L. Assn. v. Cleveland Woolen Mills*, 27 C. C. A. 212; 54 U. S. App. 290; 82 Fed. Rep. 508; *Green v. Equitable, etc., Assn.*, 105 Ia. 828; 75 N. W. R. 635.

³ *Magoffin v. Mutual Reserve Fund Life Assn.*, 87 Minn. 260; 91 N. W. R. 1115; *Biggs v. Mutual Reserve Fund L. Assn.*, 128 N. C. 5; 37 S. E. R. 955; *D'Arcy v. Mutual L. Ins. Co.*, 108 Tenn. 567; 69 S. W. R. 768; *Connecticut Mutual L. Ins. Co. v. Spratley*, *supra*.

⁴ *Mutual Reserve Fund L. Assn. v. Phelps*, 190 U. S. 147; 47 L. Ed. 987, where a valuable note is appended.

⁵ *Woodward v. Mutual Reserve L. Ins. Co.* (N. Y.), 71 N. E. R. 10; reversing 82 N. Y. Supp. 908.

⁶ *Mooney v. Buford*, 18 C. C. A. 421; 34 U. S. App. 581; 72 Fed. Rep. 32

⁷ *Sparks v. National Masonic Accident Assn.*, 73 Fed. Rep. 277; *Old Wayne M. L. Assn. v. Flynn* (Ind. App.), 66 N. E. R. 57; *Abraham v. Mutual Reserve Fund L. Assn.*, 183 Mass. 116; 66 N. E. R. 605. But see *Labrano v. Imperial Council, etc.*, 20 R. I. 27; 38 L. R. A. 546; 37

where suit is begun on a policy wholly executed in another State, if the company, prior to the issuance of such policy, had withdrawn from the State;¹ nor where it is sought to obtain an injunction restraining the collection of assessments alleged to be excessive, since such a suit involves the regulation of the internal affairs of a foreign corporation.²

§ 454. **Declaration or Petition.** — The Supreme Court of Alabama thus states the general rule in regard to a petition or declaration on an insurance policy:³ “Independent of statutory provisions, the rules of pleadings are the same in their application to the contract of insurance as to other contracts. The contract or policy of insurance must be declared on, in *hæc verba*, or according to its legal effect; the plaintiff’s interest in the subject of insurance; the payment of the premium; the inception of the risk; the performance of any precedent condition or warranty contained in the policy, and the loss, or happening of

Atl. Rep. 345; *Greenleaf v. National Assn.*, 130 Fed. R. 209; *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423; 37 N. E. R. 206; 23 L. R. A. 863.

¹ *Mutual Reserve F. L. Assn. v. Boyer*, 62 Kan. 31; 61 Pac. Rep. 387; 50 L. R. A. 538.

² *Condon v. Mutual Reserve Fund L. Assn.*, 89 Md. 99; 44 L. R. A. 149; 42 Atl. Rep. 944. Other cases involving the question of service of process are *German Ins. Co. v. Hall*, 1 Kans. App. 43; 41 Pac. Rep. 69; *Swedish-American National Bank v. Bleeker* (Wis.), 75 N. W. R. 740; *Palmer v. Northern, etc., Assn.*, 175 Mass. 396; 56 N. E. R. 828; *Harrigan v. Life Ins. Co.*, 128 Cal. 531; 61 Pac. Rep. 99; *Prudential Ins. Co. v. Connelly* (Neb.), 98 N. W. R. 812; *Travelers’ Protective Assn. v. Gilbert*, 41 C. C. A. 180; 101 Fed. Rep. 46. As to service in Virginia, *Millan v. Mutual Reserve Fund L. Assn.*, 103 Fed. Rep. 764. As to Delaware, *Equitable Life Assur. Soc. v. Fowler*, 125 Fed. Rep. 88. Under the Kentucky statute, *Home Benefit Soc. v. Muehl*, 109 Ky. 479; 59 S. W. R. 520; 61 S. W. R. 371. As to Missouri statute, *Grand Chapter, etc. v. Francis*, 93 Mo. App. 560; 67 S. W. R. 732. As to service on local officer of society, *Taylor v. Order of Railway Conductors*, 89 Minn. 222; 94 N. W. R. 684; *Bankers’ Union v. Nabers* (Tex. Civ. App.), 81 S. W. R. 91.

³ *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538.

the event, on which within the terms and meaning of the policy the liability of the insurer attaches, must be alleged.¹ The general rule applicable to all executory contracts is that if the defendant's performance depended upon a condition precedent, the plaintiff must aver the fulfillment of such condition, whether it is affirmative or negative, or to be performed or observed by him, or the defendant, or a mere stranger to the contract, or must show an excuse for non-performance. If non-performance is excused, the matter of excuse must be distinctly averred.² These rules of pleading at common law have been modified, and to some extent abrogated by the statutory provisions to which we have referred. * * * A mere statement of the contract or policy, followed by the general averment that the plaintiff had complied with all its provisions on his part, and that the defendant had not in a specified matter performed it, is sufficient."³ A declaration or petition is insufficient unless it alleges that the notice and proofs of loss required by the policy have been given, or compliance with this condition waived. The general averment that plaintiff has "fulfilled all the conditions" of the policy is not an averment that proofs of loss had been made in a certain way and within a certain time.⁴ Matter in defeas-

¹ 2 Greenl. Ev., § 376.

² 1 Chitty Pl. 320-267.

³ *Richardson v. North Missouri Ins. Co.*, 57 Mo. 413; *Bamberger v. Commercial Credit, etc., Co.*, 15 C. B. 676; 1 Jur. (N. S.) 500; *Mass. Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Daniels v. Andes Ins. Co.*, 2 Mont. 78; *Tripp v. Vermont L. Ins. Co.*, 55 Vt. 100; *Scheiderer v. Travelers Ins. Co.*, 58 Wis. 13; *Continental L. Ins. Co. v. Houser*, 89 Ind. 258; *Modern Woodmen v. Noyes*, 158 Ind. 503; 64 N. E. R. 21; *Supreme Council v. Orcutt*, 119 Fed. R. 682; 56 C. C. A. 294; *Grand Lodge v. Hall*, 31 Ind. App. 107; 67 N. E. R. 272; *Supreme Lodge, etc. v. Edwards*, 15 Ind. App. 524; 41 N. E. R. 850; *Metropolitan L. Ins. Co. v. Rutherford*, 95 Va. 773; 30 S. E. R. 383.

⁴ *Edgely v. Farmers' Ins. Co.*, 43 Ia. 587; *Fayerweather v. Phoenix*

ance of the plaintiff's action need not be stated in the declaration, and whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso, or a condition subsequent, it must in its nature be a matter of defense, and ought to be shown in the pleading, by the opposite party. It is sufficient to state in the declaration those parts of the contract whereof a breach is complained of, or, in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues; it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. It is not necessary therefore for a declaration to negative matters of defense.¹ Nor to allege matters peculiarly within the knowledge of defendant.² In a suit on a policy of life insurance, procured by the insured for the benefit of another, it is not necessary that the declaration should aver that the beneficiary had any interest in the life of the insured, but a different rule prevails where one procures an insurance on the life of another. In such case the plaintiff must aver in his declaration on the policy

Ins. Co., 7 N. Y. St. R. 25; *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Royal Ins. Co. v. Smith*, 8 Ky. Law R. 521; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507. But see *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; *Schoback v. German-town, etc., Ins. Co.*, 59 *Id.* 86; *Sun Mut. Ins. Co. v. Holland*, 2 Wills. (Tex.) 391. To the contrary: *Farmers' Bank v. Manchester Ass. Co.* (Mo. App.), 80 S. W. R. 299.

¹ *Simmons v. Insurance Co.*, 8 W. Va. 474; *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Clay F., etc., Ins. Co. v. Wusterhausen*, 75 Ill. 285; *Forbes v. Am. M. L. Ins. Co.*, 15 Gray, 249; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Conway F. Ins. Co. v. Sewall*, 54 Me. 352; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Guiltman v. Metropolitan L. Ins. Co.*, 69 Vt. 469; 38 Atl. R. 315.

² *Supreme Lodge v. Foster*, 26 Ind. App. 333; 59 N. E. R. 877; *Frame v. Sovereign Camp*, 67 Mo. App. 127.

that he had an insurable interest in the life assured and prove the same affirmatively as a part of his case.¹ The mere statement that plaintiff had an insurable interest is a conclusion of law; facts must be stated from which, as a matter of law, the court can infer the existence of such an interest.² And so in an action against a benefit society to recover benefits it is not sufficient to allege that there was a "rule" whereby plaintiff was entitled, etc. The rule or its substance must be stated.³ And in an action against a benefit society to recover a balance alleged to be due during the plaintiff's sickness at the rate of three dollars per week, the mere statement that such an amount is "the sum paid to the sick of said society" is insufficient and states no cause of action. In such case the plaintiff must state how the obligation to pay this money arises, what the rules and regulations in regard to beneficiaries are, and that he has complied with such rules.⁴ No principle is better settled, than that a statement of demand which

¹ *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Mass. Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; 24 N. Y. 653; s. c. 8 Ga. 534; *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422; *Christman v. State Ins. Co.*, 16 Oreg. 283; 18 Pac. Rep. 466; *Ky. Life, etc., Ins. Co. v. Hamilton*, 11 C. C. A. 42; 63 Fed. R. 93. But see *contra*, *Tabor v. Gross, etc., Mfg. Co.*, 11 Colo. 419; 18 Pac. Rep. 537; *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131; 36 N. E. R. 429; *Masonic Ben. Assn. v. Bunch*, 109 Mo. 560; 19 S. W. R. 25.

² *Elkhart Mut. Aid, etc., Assn. v. Houghton*, 98 Ind. 149; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

³ *Irish Catholic, etc. v. O'Shaughnessy*, 76 Ind. 191; *Beneficial Soc. v. White*, 30 N. J. E. 313.

⁴ *Beneficial Society v. White*, 30 N. J. L. 313. See for examples: *Johns v. N. W. Mut. R. Assn.*, 87 Wis. 111; 58 N. W. R. 76; *McFarland v. U. S. Mut. Acc. Assn.*, 104 Mo. 204; 27 S. W. R. 436; *Warner v. National L. Ins. Co.*, 100 Mich. 137; 58 N. W. R. 667; *Mellerup v. Travelers Ins. Co.*, 95 Ia. 317; 63 N. W. R. 665; *Congower v. Equitable, etc., Assn.*, 94 Ia. 499; 63 N. W. R. 192; *Union Cent. L. Ins. Co. v. Jones*, 17 Ind. App. 592; 47 N. E. R. 342; *Beckner v. Beckner*, 104 Ga. 219; 30 S. E. R. 622.

does not state facts enough to establish the liability of the party sued, without the necessity of supplying other facts by proof, is radically defective and will not support a judgment.¹ A foreign statute must be pleaded specifically.² Where a statute saves a forfeiture and is pleaded facts bringing the case within such statute must be stated.³ It is not necessary for the plaintiff, although the application, by the terms of the policy, is made a part of the contract and the truth of the statements made therein warranted, to set out in his complaint or declaration the application, nor in the first instance to prove performance of any of its conditions, or the truth of the statements contained therein, because the agreement or warranties contained in such application are not conditions precedent, but qualifications of the liability of the insurer growing out of independent covenants and in the nature of conditions subsequent, the breach of which are matters of defense for the insurer to allege and prove.⁴ In California and elsewhere it has been held

¹ *Beneficial Society, etc. v. White, supra.* See, as to what are necessary averments in a complaint against a benefit society: *Supreme Council, etc. v. Forsinger*, 125 Ind. 52; 25 N. E. 129; *Wright v. Supreme Commandery, etc.*, 87 Ala. 426; 13 South. R. 564. As to inconsistent allegations: *Burton v. Conn. Mut. L. Ins. Co.*, 119 Ind. 507; 21 N. E. R. 746. Peculiar certificates: *Lawyer v. Murphy*, 58 Conn. 294; 20 Atl. R. 457; *Emmeluth v. Home Ben. Assn.*, 122 N. Y. 130; 25 N. E. R. 234; affg. 46 Hun, 681. As to attachment see *Knorr v. N. Y. State, etc., Assn.*, 29 N. Y. Supp. 508. As to special circumstances, *Franklin L. Ins. Co. v. Adams*, 90 Ill. App. 658; *Sahlman v. Mut. R. F. L. A.*, 53 S. C. 183; 31 S. E. R. 50; *McElfresh v. Oddfellows etc., Assn.*, 21 Ind. App. 557; 52 N. E. R. 819; *Sup. Lodge v. Fletcher*, 78 Miss. 377; 29 Sou. R. 523; *Wells v. Vermont L. Ins. Co.*, 28 Ind. App. 620; 63 N. E. R. 578; *Osborne v. Home L. Ins. Co.*, 123 Cal. 610; 56 Pac. R. 616.

² *Morton v. Supreme Council*, 100 Mo. App. 76; 73 S. W. R. 259.

³ *Schiefers v. Mass. Mut. L. Ins. Co.*, 46 Ohio St. 418; 21 N. E. R. 635.

⁴ *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *May v. Buckeye Ins. Co.*, 25 Wis. 291, where it is said that it would be intolerable, in an action on an insurance policy, to require the plaintiff to prove affirmatively in the first instance the truth of every statement usually contained in an application

to the contrary.¹ In some States waiver can be shown under an allegation of performance.²

§ 455. **Pleas, or Answers, Replications.** — The same rules apply to pleas, answers and replications in actions on insurance policies as in those on other written instruments. The books are full of instances of defective pleadings which were held so because the fundamental principles of pleading were disregarded. It is not necessary to particularly refer to these cases, for to do so would be unprofitable. We shall mention but a few. A general replication of waiver is bad unless it avers the facts which constitute waiver with reasonable certainty; ³ facts, not conclusions of law, must be averred.⁴ If an answer set up false answers to questions in the application it must particularize them.⁵ All matters which show the transaction to be void, or voidable in point

for insurance; *Mut. Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Commonwealth Ins. Co. v. Moninger*, 18 Ind. 352; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Penn. Mut. L. Ins. v. Wiler*, 100 Ind. 92; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Herron v. Peoria, etc., Ins. Co.*, 28 Ill. 235; *Britt v. Mut. Ben. L. Ins. Co.*, 105 N. C. 175; 10 S. E. R. 896; overruling *Bobbitt v. Ins. Co.*, 66 N. C. 70; *Supreme Lodge v. Wollschlager*, 22 Colo. 213; 44 Pac. R. 598; *Conn. Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 19; 73 Fed. R. 444; *Knights Templar, etc. v. Dubois*, 26 Ind. App. 38; 57 N. E. R. 943; *Himmelein v. Supreme Coun., etc. (Cal.)*, 33 Pac. R. 1130.

¹ *Bidwell v. Insurance Co.*, 3 Sawy. 261; *Gilmore v. Lycoming F. Ins. Co.*, 55 Cal. 123.

² *James v. Mut. R. F. L. Assn.*, 148 Mo. 1; 49 S. W. R. 978; *Andrus v. Ins. Assn.*, 168 Mo. 151; 67 S. W. R. 582.

³ *Preston v. Travelers' Ins. Co.*, 58 N. H. 76; *Texas Banking, etc., Co. v. Hutchins*, 53 Tex. 61.

⁴ *National Benefit Assn. v. Bowman*, 110 Ind. 355; *Gray v. National Ben. Assn.*, 111 Ind. 531; 11 N. East. Rep. 477; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Penn. M. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Benjamin v. Conn. Ind. Assn.*, 44 La. Ann. 1017; 11 South R. 628.

⁵ *Insurance Co. v. Ewing*, 92 U. S. 377; *Deane v. Life Association*, 86 Mo. App. 459; *Studwell v. Charter Oak L. Ins. Co.*, 17 Hun, 602.

of law, on the ground of fraud or otherwise, should be pleaded specially; ¹ such as that the policy is a wager policy; ² or, in some States, the breach of the conditions the defense relies on.³ In an action for benefits it is proper, if expulsion be pleaded as a defense, to make the issue whether the expulsion be legal.⁴

§ 456. **Evidence in Actions on Insurance Contracts.** — It is not within the scope of this work to review, in connection with the reported decisions of the courts, the law of evidence in actions upon life insurance policies. To do this would require a treatise of itself. In general it may be stated that the same rules of evidence govern in actions upon policies of insurance as upon other instruments of writing. The fundamental principles which lie at the foundation of the law of evidence apply to all cases alike and the subject-matter of action is not material. In insurance cases these principles have been reaffirmed, and though at times courts have been accused of departure from them,

¹ *Theodore v. New Orleans, etc., Ins. Assn.*, 28 La. Ann. 917; *Meister v. Merchants' M. Ins. Co., Manning's Cas. (La.)* 169. As to departure in pleading, see *Odd-fellows M. A. Assn. v. Sweetzer*, 117 Ind. 97; 19 N. E. R. 722; *Demings v. Supreme Lodge, etc.*, 29 App. Div. 622; 48 N. Y. Supp. 649; *Supreme Lodge, etc. v. Rampy (Tex. Civ. A.)*, 45 S. W. R. 422; and as to sufficiency of allegation of non-payment of assessment, *Gray v. Supreme Lodge, etc.*, 118 Ind. 293; 20 N. E. R. 833.

² *Good v. Mass. M. L. Ins. Co.*, 73 N. Y. 480; *Shea v. Mass. Ben. Assn.*, 160 Mass. 289; 35 N. E. R. 855.

³ *Bittinger v. Providence, etc., Ins. Co.*, 24 Fed. Rep. 549.

⁴ *Blumenfeldt v. Korschuck*, 43 Ill. App. 434; *Mulroy v. Supreme Lodge K. of H.*, 28 Mo. App. 463; *Ludowski v. Polish Catholics', etc., Soc.*, 29 M. A. 337. As to other questions as to pleading see: *Murphy v. Mut. R. F. L. A.*, 114 Fed. R. 404; *Hennessy v. Metropolitan Life Ins. Co.*, 74 Conn. 699; 52 Atl. R. 490; *Supreme Commandery, etc. v. Hughes*, 24 Ky. L. R. 984; 70 S. W. R. 405; *Earney v. Modern Woodmen*, 79 Mo. App. 385. As to what can be shown under general denial: *Guiltinan v. Metropolitan L. Ins. Co.*, 69 Vt. 439; 38 Atl. R. 315. As to bill of particulars: *Taylor v. Security M. L. Ins. Co.*, 73 App. Div. 319; 76 N. Y. Supp. 671.

under the supposed pressure of the equities of the case or public sentiment, it will be found that if this has been seemingly done it has been to give effect to great principles of justice without too strict a regard to mere technicalities. We shall briefly refer to some of the leading cases bearing upon the special characteristics of insurance contracts and the evidence permissible in actions for their enforcement. We append in a note a reference to some of the later cases where questions of evidence are considered.¹

¹ The plaintiff must prove payment of the first premium if the policy recites that it is not to be in force until it is paid. *Manhattan L. Ins. Co. v. Meyer*, 109 Ky. 372; 59 S. W. R. 30. The fact that the policy was found among papers of deceased is evidence of delivery. *Jones v. N. Y. Life Ins. Co.*, 168 Mass. 245; 47 N. E. R. 92. The application is admissible though not referred to. *Bopple v. Supreme Tent, etc.*, 18 App. Div. 188; 45 N. Y. Supp. 1096. And the policy without the application. *Albert v. Mut. L. Ins. Co.*, 122 N. C. 92; 30 S. E. R. 327. The official reports of the lodge to its superior are inadmissible. *Supreme Lodge, etc., v. Rumpy (Tex. Civ. A.)*, 45 S. W. R. 422; *Supreme Council, etc., v. O'Neill*, 108 Ill. App. 47. But letters offered by plaintiff may amount to admissions. *Oeters v. Supreme Lodge, etc.*, 98 Va. 201; 35 S. E. R. 356; see also *Travelers Ins. Co. v. Wagley (C. C. A.)*, 74 Fed. R. 457. As to other interesting questions of evidence, see *Conn. Mut. L. Ins. Co. v. Hillman*, 46 C. C. A. 668; 107 Fed. R. 834; *s. c.* on appeal, 183 U. S. 208; *Mueller v. Grand Grove, etc.*, 69 Minn. 236; 72 N. W. R. 48; *Dobyns v. Bay State, etc.*, 144 Mo. 95; 45 S. W. R. 1107; *Modern Woodmen v. Von Wald*, 6 Kan. App. 231; 49 Pac. R. 782; *Louis v. Conn. M. L. Ins. Co.*, 172 N. Y. 659; 65 N. E. R. 1119; *Supreme Council, etc. v. Landers*, 23 Tex. Civ. A. 625; 57 S. W. R. 307; *Black v. Travelers, etc.*, 58 C. C. A. 14; 121 Fed. R. 732; 61 L. R. A. 500; *Rambousek v. Supreme Council, etc.*, 119 Ia. 263; 93 N. W. R. 277; *German Am. M. L. A. v. Farley (Ga.)*, 21 S. E. R. 615. The question of what constitutes fraud is fully discussed in *Penn. Mut. L. Ins. Co. v. Mechanics, etc., Co.*, 19 C. C. A. 286; 72 Fed. R. 413; 38 L. R. A. 1. Evidence as to habits is considered in *Chambers v. N. W. Mut. L. Ins. Co.*, 64 Minn. 495; 67 N. W. R. 367. As to a letter being insufficient to show an agreement to pay assessments: *Supreme Commandery v. Merrick*, 165 Mass. 421; 43 N. E. R. 127. Parol evidence is not admissible after the application is excluded. *Considine v. Metropolitan L. Ins. Co.*, 165 Mass. 462; 43 N. E. R. 201. If the by-laws are not referred to in the policy they may be excluded, *Lagrone v. Timmerman*, 46 S. C. 372; 24 S. E. R. 290.

The books of an association are admissible to show the issue of the policy when same is denied.¹ And the records of a society are *prima facie* evidence in its favor.² It is not competent to attempt to prove that the company would not have accepted the application had it known of an attempt at suicide.³ If the certificate is not introduced there is a failure of proof, the answer being a general denial.⁴

§ 457. **Presumptions.** — The following presumptions, among others, have received judicial sanction: In an action to determine the legality of the proceedings by which a member has been expelled from a benefit society, every presumption is in favor of the fairness of the expulsion;⁵ in the absence of proof it will be presumed that the person who signed an application for insurance made the representations contained therein, and knew and indorsed its contents.⁶ And that the applicant correctly stated his age.⁷ Nothing appearing to the contrary, the courts

¹ New Era L. Assn. v. Rossiter, 132 Pa. St. 314; 19 Atl. R. 140.

² Van Frank v. U. S. Mas. Ben. Soc., 158 Ill. 560; 41 N. E. R. 1005; Hannum v. Waddill, 135 Mo. 153; 36 S. W. R. 616.

³ Louis v. Conn. Mut. L. Ins. Co., 172 N. Y. 659; 65 N. E. R. 1119.

⁴ Knights of Honor v. Fortson, 78 Tex. 475; 14 S. W. R. 922. As to what plaintiff must show as to what the amount of the fund is: Cushman v. Family Fund Soc., 13 N. Y. Supp. 428. As to evidence of insurable interest: Brennan v. Franey, 142 Pa. St. 301; 21 Atl. R. 803; Shore v. Shore, 79 Wis. 497; 48 N. W. R. 647. And as to various points as to evidence in action on insurance contracts: Travellers L. Ins. Co. v. Sheppard, 85 Ga. 751; 12 S. E. R. 18; Stepp v. National, etc., Assn., 37 S. C. 417; 16 S. E. R. 134. As to who is beneficiary, the policy naming none: Norristown, etc. v. John Hancock L. Ins. Co., 132 Pa. St. 385; 19 Atl. R. 270.

⁵ Bachmann v. New Yorker, etc., Bund, 64 How. Pr. 442; 12 Abb. N. C. 54.

⁶ Hartford L. & A. Ins. Co. v. Gray, 80 Ill. 28; 91 Ill. 159; Fletcher v. New York L. Ins. Co., 3 McC. 603; 11 Fed. Rep. 377; N. Y. L. Ins. Co. v. Fletcher, 117 U. S. 519.

⁷ Supreme Council v. Conklin, 70 N. J. L. 565; 28 Atl. R. 659; 41 L. R. A. 449.

of one State will presume that the common law is in force in another State;¹ and that the law of another State is like that of the forum;² and that acts criminal by the common law, and the laws of all civilized countries, are criminal by the laws of the States of this Union,³ and that the company has knowledge of the habit of a local agent as to collection of premiums;⁴ and that powers of agents are co-extensive with the business intrusted to them, and that a fact connected with the approval of an assignment of a policy has been communicated to the company in the due course of business.⁵ If it be shown that a person whose life is insured was intemperate after the insurance was effected the presumption is that he became so thereafter,⁶ and if a member of an order be shown to be in good standing that he continues so;⁷ and that every man is sane, a presumption not changed by the fact of suicide.⁸ In the absence of direct evidence neither murder nor suicide will be presumed.⁹ The presumption that

¹ *Supreme Council, etc. v. Garrigus*, 104 Ind. 133.

² *Cannon v. Northwestern M. L. Ins. Co.*, 29 Hun, 470; *Neese v. Farmers' Ins. Co.*, 55 Ia. 604.

³ *Cluff v. Mut. L. Ins. Co.*, 13 Allen, 308.

⁴ *Mound City M. L. Ins. Co. v. Twining*, 19 Kan. 349.

⁵ *Breckenridge v. Am. Central Ins. Co.*, 87 Mo. 62.

⁶ *Gartside v. Conn. M. L. Ins. Co.*, 8 Mo. App. 592.

⁷ *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Zeigler v. Mut. Aid Soc.*, 1 McGloin (La.), 284; *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110; *Stewart v. Supreme Council, etc.*, 36 M. A. 319; *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131; 36 N. E. R. 429; *Forse v. Supreme Lodge, etc.*, 41 Mo. App. 106; *Cornfield v. Order, etc.*, 64 Minn. 261; 66 N. W. R. 970; *Kumle v. Grand Lodge, etc.*, 110 Cal. 204; 42 Pac. R. 634; *Monahan v. Supreme Lodge*, 88 Minn. 224; 92 N. W. R. 972.

⁸ *Weed v. Mut. Ben. L. Ins. Co.*, 70 N. J. 561; 9 Jones & Sp. 476.

⁹ *Fidelity, etc., Co. v. Egbert*, 55 U. S. App. 200; 84 Fed. R. 410; 28 C. C. A. 281; *Metzradt v. Modern Brotherhood, etc.*, 112 Ia. 522; 84 N. W. R. 498; *Carnes v. Iowa Traveling Men's, etc.*, 106 Ia. 281; 76 N. W. R. 683; *Jenkins v. Pac. M. L. I. Co.*, 131 Cal. 121; 63 Pac. R. 180. *Butsee Sackberger v. National Grand Lodge*, 73 Mo. App. 38. See also *ante*, § 336a.

a sane man found dead has not committed suicide does not apply when an insane man is so found;¹ and that one who violently attacked the wife of another knew that her husband would resist the assault with force. That the assailant was intoxicated does not change the presumption.² There is no presumption that, if in the application no answer appears to have been given to a question asked by the insurer it was answered in the negative.³ Where the members of a family all perished in a flood it was held that there was no presumption of survivorship.⁴

§ 458. **Admissibility of Parol Evidence to Explain or Modify Answers of Assured in the Application.** — One of the most important questions in insurance law is the extent to which parol testimony is admissible to explain or modify the answers of the assured in the application, which is generally referred to in the policy and made a warranty. The stipulation often also contained in the policy that the agent procuring the insurance shall be taken to be the agent of the assured and not of the company has added a new complication. By the carelessness of insurance agents or their design, caused by anxiety to effect the insurance, false answers were often written in the application, which operated when a loss occurred to defeat the claim and frequently in a miscarriage of justice. The courts were at first disposed to strictly apply the rule that parol evidence is never admissible to explain or modify the terms of a written contract. The hardships that frequently resulted and possibly the demands of public sentiment caused the application in these cases of the doctrine of equitable estoppel, or that the assured might prove by parol a state of facts which

¹ *Germain v. Brooklyn L. Ins. Co.*, 26 Hun, 604.

² *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478.

³ *Queen's Ins. Co. v. Legare*, Ramsay's App. Cas. (Low. Can.) 369.

⁴ *Cowan v. Rogers*, 73 Md. 403; 21 Atl. R. 64.

would preclude the company from insisting upon the forfeiture for breach of warranty. It is now well settled by a preponderance of authority that the assured may show by parol that, without his fault, the answers to questions in the application were not written by him or by his authority, and that he did not know its contents when he signed it;¹ or that the false statement was made in the application through the fault of insurer's agent;² as where true answers were given to the medical examiner of the company, who, by its rules, was required to write down the answers himself and he wrote them incorrectly.³ The Supreme Court of the United States thus states this doctrine:⁴ "This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party

¹ *Hanson v. Milwaukee, etc., Ins. Co.*, 45 Wis. 321; *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291; *New Jersey M. L. Ins. Co. v. Baker*, 94 U. S. 610; *Lueders v. Hartford L. & A. Ins. Co.*, 4 McC. 149; 12 Fed. Rep. 465; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun, 430; *Menk v. Home Mut. Ins. Co.*, 76 Cal. 50; 14 Pac. Rep. 837; *Id.* 117; *Dietz v. Provident L. Ins. Co.*, 31 W. Va. 851; 8 S. E. 616; *Koenig v. United L. Assn.*, 12 App. Div. 454; 42 N. Y. Supp. 752; *Nassl v. Metropolitan L. Ins. Co.*, 19 Misc. 413; 44 N. Y. Supp. 261; *Hogan v. Wallace*, 63 Ill. App. 385; *Brown v. Sovereign Camp, etc.*, 20 Tex. Civ. A. 373; 49 S. W. R. 893; *Supreme Lodge v. Dickson*, 102 Tenn. 255; 52 S. W. R. 862.

² *Ring v. Windsor, etc., Ins. Co.*, 51 Vt. 563; *McArthur v. Home L. Ins. Assn.*, 73 Ia. 336; 35 N. W. Rep. 430; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389; *Smith v. Agricultural Ins. Co.*, 6 N. Y. St. R. 127; *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 32 N. W. Rep. 610; *Hartford L. & A. Ins. Co. v. Gray*, 80 Ill. 28; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Kausal v. Minnesota, etc., Assn.*, 31 Minn. 17; *Planter's Ins. Co. v. Sorrels*, 1 Baxt. 352; *Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

³ *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *O'Brien v. Home Ben. Soc.*, 117 N. Y. 310; 22 N. E. R. 954; affg. 4 N. Y. Supp. 275. See also *Hackett v. Supreme Council, etc.*, 44 App. Div. 524; 60 N. Y. Supp. 806; *Kipp v. Metropolitan L. Ins. Co.*, 41 App. Div. 298; 58 N. Y. Supp. 494.

⁴ *Insurance Company v. Wilkinson*, 13 Wall. 222.

whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.”¹ This doctrine has, however, been received in some quarters with decided disapproval and condemned as being an innovation upon the established rules of the common law. The Court of Errors and Appeals of New Jersey has perhaps most strongly opposed the rule and, after a review of the authorities,² says that the decided weight of authority is against the admission of parol evidence as a clear violation of the salutary rule of law, that all prior statements are merged in the concluded contract, and that a contract put in writing cannot be added to or altered by parol testimony.³ In the latest ruling of the Supreme Court of the United States⁴ on this question it was disposed to lay stress upon the condition

¹ The following authorities are cited by the court or sustain its views: *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 143; *Planters' Ins. Co. v. Meyers*, 55 Miss. 479; 30 Am. Rep. 521; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Clark v. Union M. F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721, and valuable note where the authorities are collected. See *ante*, § 152; § 221, *et seq.*, and § 428.

² *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

³ The court cites: *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Smith v. Cash Mut. Ins. Co.*, 24 Pa. St. 320; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Barrett v. Union M. Ins. Co.*, 7 Cush. 175; *Lowell v. Middlesex Ins. Co.*, 8 *Id.* 127; *Jenkins v. Quincy Mut. Ins. Co.*, 7 Gray, 370; *Kibbe v. Hamilton M. Ins. Co.*, 11 *Id.* 163; *Jennings v. Chenango Co. Ins. Co.*, 2 Denio, 75; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235. See also *Southern M. Ins. Co. v. Yates*, 28 Gratt. 585. It is culpable negligence to sign an application without reading it. *Susquehanna M. F. Ins. Co. v. Swank*, 102 Pa. St. 17; *Ryan v. World M. L. Ins. Co.*, 41 Conn. 168.

⁴ *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519.

that before an estoppel can be held the assured must be shown to have not been in fault or to have neglected plain means by which he might have known of the mistake in the application, as where a copy of the application was attached to the policy.¹ All preliminary negotiations are merged in the written application and, if unambiguous, parol evidence of explanations of the agent as to the meaning of certain questions is inadmissible.²

§ 459. **Declarations of Agent.** — The general principle applies in insurance as in other cases that the declarations of an agent to be admissible in evidence must have been made in the line of his agency and in the course of the discharge of the duty he owes to his principal.³

§ 460. **Declarations of Assured.** — Declarations made by insured concerning his health after the policy has been issued on his life payable to a third party, as, for example, to his wife, are not competent in an action brought by such payee on the policy, because the contract is made with the beneficiary and not with the party whose life is insured.⁴

¹ See *ante*, §§ 152–156 inc. and § 221.

² *Masons Union, etc., Assn. v. Brockman*, 20 Ind. App. 206; 50 N. E. R. 493.

³ *Brink v. Merchants', etc., Ins. Co.* 49 Vt. 442; *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 642; reversing 2 Hun, 358; *Covenant M. Ben. Assn. v. Conway*, 10 Bradw. 348; *Walker v. Farmers' Ins. Co.*, 51 Ia. 679; *Northwestern M. L. Ins. Co. v. Roth*, 87 Pa. St. 409; *Scott v. Home Ins. Co.*, 53 Wis. 238; *Zielke v. London Ass. Corp.*, 64 Wis. 442; *Phoenix Ins. Co. v. LaPointe*, 118 Ill. 384; *United Brethren M. A. Soc. v. McDermond*, 12 W. N. C. 73; *Mars v. Virginia Home Ins. Co.*, 17 S. C. 514; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177; *B. & O. Emp. Assn. v. Post*, 122 Pa. St. 579; 15 Atl. R. 385.

⁴ *McGinley v. United States Ins. Co.*, 8 Daly, 390; *Swartzbach v. Ohio Valley, etc., Union*, 35 W. Va. 622; *American Pop. L. Ins. Co. v. Day*, 39 N. J. L. 89; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308; *Mobile L. Ins. Co. v. Morris*, 3 Lea, 101; *Valley Mut. L. Assn. v. Teewalt*, 79 Va. 421; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *McDermott v.*

And so, in an action by the assignee or beneficiary of the policy, declarations and admissions of the assured made at a time prior to and remote from the application, and disconnected with any act or fact showing his condition of health, are incompetent for the purpose of contradicting the statements made in the application,¹ but if it appear otherwise than by the declarations of assured, that such statements were untrue, then his prior declarations are admissible to show knowledge on his part of the falsity of such answers;² and statements made by the assured shortly prior to his application concerning his health, in connection with facts exhibiting his then state of health are probably admissible upon the question of the truthfulness of the answers made by him in such application.³ In an action by the beneficiary, upon a certificate issued to a member of a benefit society, it has been held that neither an application of the member for reinstatement, nor statements made by him as to the cause of his suspension, are competent evidence to prove the fact of his suspension;⁴

Centennial M. L. Ass., 24 Mo. App. 73; *Hermany v. Fidelity, etc., Assn.*, 151 Pa. St. 17; 24 Atl. R. 1064; *Tessmann v. Supreme Council, etc.*, 103 Mich. 185; 61 N. W. R. 261; *Mut. L. Ins. Co. v. Selby*, 19 C. C. A. 331; 72 Fed. R. 980; 44 U. S. App. 282.

¹ *Edington v. M. L. Ins. Co.*, 67 N. Y. 185; 5 Hun, 1; *Singleton v. St. Louis M. L. Ins. Co.*, 66 Mo. 63; *Penn. M. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Union Central L. Ins. Co. v. Cheever*, 36 Ohio St. 201; *Grossman v. Supreme Lodge K. & L. of H.*, 6 N. Y. Supp. 821; *Terwilliger v. Supreme Council, R. A.*, 2 N. Y. Supp. 144.

² *Edington v. M. L. Ins. Co.*, *supra*. See also *Mace v. Provident L. Assn.*, 101 N. C. 122; 7 S. E. R. 674.

³ *Swift v. Mass. M. L. Ins. Co.*, 63 N. Y. 186; *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225; *Avenson v. Kinnaird*, 6 East, 188. But see *Washington L. Ins. Co. v. Haney*, 10 Kan. 525; *Mulliner v. Guardian M. L. Ins. Co.*, 1 Thomp. & C. 448; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292.

⁴ *Lazensky v. Supreme Lodge K. of H.*, 31 Fed. Rep. 592; *Demings v. Supreme Lodge K. of P.*, 14 N. Y. Supp. 834; *Dodge v. Freedman's Co.*, 93 U. S. 379.

nor are any admissions of his subsequent to his becoming a member competent against his beneficiary.¹ The better view, and that logically more correct, is that the contrary is true, because the member is the party with whom the contract is made and remains so until his death, consequently up to that time he is the only party in interest, and his admissions or declarations are clearly admissible against the beneficiary. As was said by the Supreme Court of Illinois:² "But it is insisted that the court erred in admitting the petition (for reinstatement) in evidence, as against the plaintiff, who sues as a beneficiary to recover the amount of the policy. At the time the petition was presented the plaintiff had no vested interest in the policy. It belonged to Hansen and was under his exclusive control. Under the rules and regulations of the lodge he had the right to change the beneficiary at pleasure. Moreover, her rights as a beneficiary depended entirely upon Hansen's membership in the lodge, and the question of membership was one resting exclusively between Hansen and the lodge. He could withdraw from the lodge when he saw proper; he could keep his assessments paid up or not, as he chose; he could ask for a reinstatement or could exercise the right of appeal from an order of the lodge, if he desired. Any or all of these things he was at liberty to do without consulting his beneficiary; and if, therefore, Han-

¹ *Supreme Lodge K. of P v Schmidt*, 98 Ind. 374, citing *Fraternal M. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525; *Rawls v. Am. Mut. L. Ins. Co.*, 27 N. Y. 282; *Mulliner v. Guardian M. L. Ins. Co.*, 1 Thomp. & C. 448; *Hurley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Dial v. Valley M. L. Assn.*, 29 S. C. 560; 8 S. E. R. 27. See also *Masons Union, etc., Assn. v. Brockman*, 20 Ind. App. 206; 50 N. E. R. 493; *Patrons, etc., Soc. v. Hall*, 19 Ind. App. 118; 49 N. E. R. 279. Declarations as to intention to change the beneficiary are inadmissible if remote. *Rawson v. Milwaukee, etc., Co.*, 115 Wis. 641; 92 N. W. R. 378; *Supreme Lodge, etc. v. Wollschlager*, 22 Colo. 213; 44 Pac. R. 598.

² *Hansen v. Supreme Lodge K. of H.*, 140 Ill. 301; 29 N. E. R. 1121.

sen could withdraw from the lodge and thus defeat all rights his wife might have in the property, or refuse to pay assessments, and forfeit his membership, which would result the same way to her, it is plain he had the right to waive an infirmity in the notice of an assessment." Or as is said by a standard author: ¹ "While the declarant is the only party in interest, no harm can possibly result from giving full effect to his admissions. He may be supposed to best know the extent of his own rights and to be least of all disposed to concede away any that actually belonged to him." ² And if there has been no misrepresentation as to the health of assured, evidence as to what it was after the contract was consummated and of the disease of which he died, is immaterial. ³

§ 461. **Evidence of Physician as to Knowledge Acquired in Course of His Employment.** — In most, if not all the States, statutes exist providing that physicians shall not be competent witnesses as to matters communicated to them, as such, by patients, in the course of their professional business, or as to advice given in such cases. These statutes have been liberally construed by the courts and it has been generally, and without known exception, held by them that in an action upon a life policy a physician may not testify to what he learned of the ailments of the insured, if he was his patient, either by examination, or observation, or oral communication. ⁴ Information obtained which was

¹ Greenleaf on Ev., § 171.

² To the same effect are *Van Frank v. U. S. Masonic Ben. Soc.*, 158 Ill. 560; 41 N. E. R. 1005; affg. 56 Ill. App. 203; *Thomas v. Grand Lodge*, etc., 12 Wash. 500; 41 Pac. R. 882; *Supreme Council, etc. v. O'Connell*, 107 Ga. 97; 32 S. E. R. 946; *Callies v. Modern Woodmen*, 98 Mo. App. 521; 72 S. W. R. 713; *Stewart v. Sup. Coun. A. L. H.*, 36 M. A. 319; *Holland v. Supreme Council, etc.*, 54 N. J. L. 490; 25 Atl. R. 367; *Smith v. National Ben. Assn.*, 51 Hun, 575; 4 N. Y. Supp. 521.

³ *Morrison v. Wisconsin Odd-fellows' Mut. L. Ins. Co.*, 59 Wis. 162.

⁴ *Masonic M. Ben. Assn. v. Beck*, 77 Ind. 203; *Excelsior M. A. Assn.*

not necessary to enable the physician to do what was required, or before the assured became his patient, is not privileged.¹ These State statutes are binding on the Federal courts.² It is not a waiver of the privilege for the assured to give in his application the name and residence of his family physician;³ nor is it a waiver of the right to object that the beneficiary has offered in evidence facts learned in a professional capacity by another physician;⁴ nor does it alter the rule that the physician and the person he examined had never met previous to the examination and no prescription or advice was given, and the examination was made at the physician's office and not paid for by the person examined,⁵ nor that the physician was called to treat the patient against his will.⁶ The privilege extends to a partner of the physician visited,⁷ and to answers in the proofs of loss,⁸ but not to the fact of visits being made and their number.⁹ The

v. Riddle, 91 Ind. 84; *Gartside v. Conn. M. L. Ins. Co.*, 76 Mo. 446; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185; 5 Hun, 1; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun, 430; *Grattan v. National L. Ins. Co.*, 15 Hun, 74. But see *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 32 N. W. Rep. 610; *Linz v. Mass. M. L. Ins. Co.*, 8 M. A. 363.

¹ *Edington v. Ætna L. Ins. Co.*, 77 N. Y. 564; reversing 13 Hun, 543.

² *Conn. Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

³ *Masonic M. Ben. Assn. v. Beck*, 77 Ind. 203.

⁴ *Penn. M. L. Ins. Co. v. Wiler*, 100 Ind. 92.

⁵ *Grattan v. Metropolitan L. Ins. Co.*, 24 Hun, 43.

⁶ *Meyer v. Supreme Lodge K. P. (N. Y.)*, 70 N. E. R. 111.

⁷ *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384; 24 N. E. R. 86.

⁸ *Helwig v. Mutual L. Ins. Co.*, 12 N. Y. Supp. 172; *Buffalo, etc., Co. v. Knights Templars, etc., Assn.*, 126 N. Y. 540; *McKinley v. Metropolitan L. Ins. Co.*, 26 N. Y. Supp. 63.

⁹ *Patten v. United, etc., Assn.*, 133 N. Y. 450; 31 N. E. R. 341; *Breisenmaister v. Supreme Lodge, etc.*, 81 Mich. 525; 45 N. W. R. 977. As to various questions as to evidence of a physician, see *Mut. L. Ins. Co. v. Selby*, 44 U. S. App. 282; 19 C. C. A. 331; 72 Fed. R. 980; *Casey v. National Union*, 3 App. D. C. 370; *Yore v. Booth*, 110 Cal. 238; 42 Pac. R. 808;

question of privilege may be raised by an assignee.¹ But it has been held² that the provisions of the Missouri statute prohibiting a physician from testifying to any information he may have acquired from any patient, while visiting him professionally, may be waived by the patient, and, when waived by a clause in an application for life insurance, such waiver is binding on the beneficiary. The Court of Appeals of New York strictly construes the statute of that State as to waiver of the statutory exemption.³

§ 462. **Opinion Evidence.** — Opinion evidence is admissible in actions on insurance policies, as in other cases and under the same conditions and limitations. Often, therefore, the testimony of persons versed in the business of insurance is allowed, and these experts can testify as to matters peculiarly within their knowledge, as, for example, that the business of a farmer is considered the least hazardous occupation;⁴ but it does not follow that because one is an insurance agent that he is qualified to testify as an expert.⁵ Sometimes non-experts are permitted to give opinions as, for instance, as to the insanity of a person if all the facts upon which it is based are stated;⁶ but not unless the facts on which the opinion is based are stated;⁷ but one

Plumb v. Penn. M. L. Ins. Co. 108 Mich. 94; 65 N. W. R. 611; *Head Camp, etc. v. Locher* (Colo. App.), 68 Pac. R. 136; *Smith v. Metropolitan L. Ins. Co.*, 183 Pa. St. 504; 38 Atl. R. 1038.

¹ *Breisenmeister v. Supreme Lodge, etc.*, *supra*.

² *Andreveno v. Mutual Reserve Fund L. Assn.*, 84 Fed. Rep. 870; *Thompson v. Ish*, 99 Mo. 160; 12 S. W. R. 510.

³ *Meyer v. Supreme Lodge K. P. (N. Y.)*, 70 N. E. R. 111; affg. 81 N. Y. Supp. 813.

⁴ *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

⁵ *Stennett v. Penn. F. Ins. Co.*, 68 Ia. 674.

⁶ *Butler v. St. Louis L. Ins. Co.*, 45 Ia. 93; *United Brethren M. A. Soc. v. O'Hara*, 120 Pa. St. 256; 13 Atl. Rep. 932; *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

⁷ *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535.

not a physician cannot state his conclusion as to the cause of the death of a person from knowledge obtained by seeing him in his last illness,¹ nor can a witness testify as to the age of a person, he judging from the latter's appearance;² nor is the opinion of a witness admissible as to the effect upon a person, of a habit of drunkenness five years before a policy was issued on his life, the witness knowing nothing concerning his habits in the meantime.³ Physicians and surgeons of practice and experience are experts, and their opinions upon questions embraced in their profession and practice are admissible, though they have not made the particular disease in question a specialty.⁴ A physician who attended the insured in his last illness may give his opinion as to the disease which caused his death;⁵ or that death from the disease of which assured died is the result of other diseases of long standing and not of any sudden causes,⁶ and as to the effect of a certain disease on the mind;⁷ but such an expert cannot give his opinion on the testimony in a case,⁸ nor his opinion as to the character of a risk on a man's life, if within three months he had had a hemorrhage of the stomach.⁹ Opinions are not admissible if they are based on conjecture, as where a medical witness testified that he had an impression sufficient to satisfy his own mind, but not enough on which to base an opinion;¹⁰ nor if the question does not call for facts and knowledge

¹ *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281.

² *Valley M. L. Assn. v. Teewalt*, 79 Va. 421. But see to the contrary *Elsner v. K. & L. of H.*, 98 Mo. 640; 11 S. W. R. 990.

³ *Northwestern M. L. Ins. Co. v. Muskegon Bank*, 122 U. S. 501.

⁴ *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

⁵ *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290.

⁶ *Eddington v. Mut. L. Ins. Co.*, 77 N. Y. 564.

⁷ *Koenig v. Globe M. L. Ins. Co.*, 10 Hun, 558.

⁸ *Butler v. St. Louis Ins. Co.*, 45 Ia. 93; *Hagadorn v. Conn. M. L. Ins. Co.*, 22 Hun, 249.

⁹ *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622.

¹⁰ *Higbie v. Guardian M. L. Ins. Co.*, 53 N. Y. 603.

peculiarly within the knowledge of an expert, as whether, if the insured had a certain disease and committed suicide, it should be attributed to such disease; ¹ nor can a medical witness state the meaning of the term, "family physician." ² Opinions of officers of benefit societies as to the interpretation to be given to its laws are inadmissible, and ³ so is proof of the custom and usages of the society respecting the construction of the contract. ⁴ In an action upon a certificate in a mutual association, where the application of the member showed that he drank no liquor at all, and the validity of the certificate depended upon the truth or falsity of the representations in the application, the medical expert of the association issuing the certificate was asked several questions, to which objections were made and sustained, whether the application for membership would have been favorably passed on, if it had been stated in such application that the applicant drank liquor. The court, in passing upon these objections, said: ⁵ "We think that the objections to these questions were properly sustained. The real issue was, whether the statements, made in the application, were true or false. What would have been the effect, if some different statement from that, therein contained, had been made to the association, was of no consequence. The witness might give his opinion on a matter of science, connected with his profession, but he could not be allowed to state his views of the manner in which others would probably be influenced, if certain specified facts existed." Testimony, called for by questions of a similar character, has been generally held inadmissible. ⁶ There is, however, some

¹ *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 N. Y. 169.

² *Reid v. Piedmont & Arlington L. Ins. Co.*, 58 Mo. 421.

³ *Davidson v. Supreme Lodge K. of P.*, 22 Mo. App. 263.

⁴ *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509.

⁵ *Northwestern B. & M. A. Assn. v. Hall*, 118 Ill. 169.

⁶ *Co-operative L. Assn. v. Leflore*, 53 Miss. 1; *Mutual Ben. L. Ins. Co. v. Wise*, 34 Md. 583; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525;

authority tending to the contrary.¹ A medical examiner may testify as to the effect on his mind and action of certain answers of the applicant.²

§ 463. **Offering Application in Evidence as Part of Contract.** — On principle, if by the terms of the policy the application is made a part thereof, both should be offered in evidence together, and it is error to admit the policy without the application if objection is made,³ but the error is cured if afterwards the company offer the application;⁴ or, as the application is one which belongs to and is in the possession of the company, if the latter on notice refuses to produce it, the policy is admissible without the application;⁵ and it is also admissible without the application if the latter is only referred to in the policy but not made a part thereof;⁶ or when the insured swears he never signed the application.⁷ A certificate containing a conditional

Rawls v. Am. Mut. L. Ins. Co., 27 N. Y. 282; 36 Barb. 357; *Durrell v. Bederly*, 1 Holt N. P. 283; *Lyman v. State M. F. Ins. Co.*, 14 Allen, 329; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Campbell v. Rickards*, 5 Barn. & A. 480; *Mace v. Provident L. Assn.*, 101 N. C. 122; 7 S. E. 674.

¹ The following are cited in *Co-operative L. Assn. v. Leflore*, 53 Miss. 1, but they do not support fully the claim there made: *Berthon v. Loughman*, 2 Stark. N. P. 258; *Webber v. Eastern R. R.*, 2 Met. 147; *Kern v. South St. L. M. Ins. Co.*, 40 Mo. 19; *Hawes v. New England Ins. Co.*, 2 Curtis C. C. 229; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

² *Valton v. Loan Fund. Ass. Soc.*, 1 Keyes, 21.

³ *American Underwriters' Ass. v. George*, 97 Pa. St. 238; *Lycoming F. Ins. Co. v. Storrs*, *Id.* 361. See *contra*, *Cushman v. United States L. Ins. Co.*, 4 Hun, 783; *Roach v. Ky. Mut. Security F. Co.*, 28 S. C. 431; 6 S. E. Rep. 286. In *Magrue v. United L. & Acc. Assn.*, 24 N. Y. Supp. 618, it is said that it is discretionary with the court to require the application to be offered. See also *Sladden v. N. Y. Life Ins. Co.*, 29 C. C. A. 596; 86 Fed. R. 102; 58 U. S. App. 482, as to presumption that copy attached to policy is correct.

⁴ *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185; *Rich v. Rich*, 16 Wend. 666.

⁵ *American Underwriters' Ass. v. George*, *supra*.

⁶ *Edington v. Mut. F. Ins. Co.*, *supra*.

⁷ *Commercial Union Ass. Co. v. Elliott (Pa.)*, 13 Atl. Rep. 970; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; 40 N. W. R. 386.

promise is not admissible under averment of a positive promise.¹

§ 464. **Evidence of Preliminary Negotiations or Agreements.**—The law will not allow the terms of a written contract to be varied by parol evidence of what was said at the time it was negotiated. Written contracts must speak for themselves; and the language used cannot be varied or controlled by parol evidence of what was said by the parties or their agents at the time the contract was negotiated. A written contract may sometimes be discharged, or one or more of its provisions waived, by a parol agreement subsequently made; but never by what was said previous to or at the time it was made, except in a direct proceeding in equity to reform, rescind, or compel the specific performance of it. Never in an action at law. This rule is applicable to insurance policies as well as all other written contracts.² The assured cannot, therefore, be allowed

¹ *New Home, etc., Assn. v. Hagler*, 23 I l. App. 457; but see *Hefferman v. Supreme Counc. A. L. H.*, 40 M. A. 605 and *Thomas v. Guaranty, etc., Assn.*, 73 Mo. App. 371. As to law requiring copy of application to be attached to policy: *Mahon v. Pacific, etc., Ins. Co.*, 144 Pa. St. 409; 22 Atl. R. 876; *Hebb v. Kittaning Ins. Co.*, 138 Pa. St. 222; 20 Atl. R. 837. As to filing application: *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; 22 N. E. R. 413. Other cases involving questions as to admissibility of application under statutes requiring a copy to be attached to the policy are *Johnson v. Des Moines L. Assn.*, 105 Ia. 273; 75 N.W. R. 101; *Morris v. State L. Ins. Co.*, 183 Pa. St. 563; 39 Atl. R. 52. The subject is fully discussed in the case of *Johnson v. Mutual Life Ins. Co.*, 180 Mass. 407; 62 N. E. R. 733; 63 L. R. A. 833 where valuable note is appended.

² *Combs v. Charter Oak L. Ins. Co.*, 65 Me. 382; *Jennings v. Quincy M. F. Ins. Co.*, 7 Gray, 370; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen, 569; *Ashworth v. Builders M. F. Ins. Co.*, 112 Mass. 422; *Ryan v. World M. L. Ins. Co.*, 41 Conn. 168; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392; *Sullivan v. Cotton States L. Ins. Co.*, 43 Ga. 423; *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 187; *Masons Union, etc., Assn. v. Brockman*, 20 Ind. App. 206; 50 N. E. R. 493.

to show that before the policy was executed the agent agreed to extend the time of payment of the premium;¹ or to vary any of the stipulations, admissions or receipts in the policy;² or as to any verbal understanding with the agent;³ or that a policy payable on a day designated therein was payable on a different day;⁴ or, if the language of the policy is clear, as to the construction the parties have placed upon it;⁵ or as to the intention of the parties that another than the one named in the policy should be the beneficiary;⁶ unless there is a latent ambiguity in the designation.⁷ Letters of the company subsequent to the issue of a policy cannot modify its terms.⁸

§ 465. **When Parol Evidence Admissible.** — Parol evidence is admissible to explain receipts given for premiums;⁹ and to show in what sense special words, as “spitting of blood,” were used in an application for life insurance;¹⁰ and to show fraudulent representations as to a local board,¹¹ or

¹ *Coombs v. Charter Oak L. Ins. Co.*, *supra*; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Clevenger v. Mut. L. Ins. Co.*, 2 Dak. 114; *Mitchell v. Universal L. Ins. Co.*, 54 Ga. 289.

² *Trager v. Louisiana Eq. L. Ins. Co.*, 31 La. Ann. 235; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286.

³ *Carlin v. Western Ass. Co.*, 57 Md. 515.

⁴ *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151.

⁵ *Michael v. St. Louis M. F. Ins. Co.*, 17 Mo. App. 23; *Nashville L. Ins. Co. v. Matthews*, 8 Lea, 499.

⁶ *Baldwin v. State Ins. Co.*, 60 Ia. 497; *Russell v. Russell*, 64 Ala. 500; *Elliott v. Whedbee*, 94 N. C. 115.

⁷ *Pace v. Pace*, 19 Fla. 438; *Richardson v. Home Ins. Co.*, 15 Jones & Sp. 128; *Same v. Firemen's Ins. Co.*, *Id.* 159. See *Daniels v. Citizens' Ins. Co.*, 10 Biss. 116; 5 Fed. Rep. 425.

⁸ *Walsh v. Chicago, etc., Soc.*, 81 Mo. App. 30.

⁹ *Texas M. L. Ins. Co. v. Davidge*, 51 Tex. 244; *Scurry v. Cotton States L. Ins. Co.*, 51 Ga. 624; *Todd v. Piedmont, etc., L. Ins. Co.*, 34 La. Ann. 63; *McLean v. Piedmont, etc., Ins. Co.*, 29 Gratt. 361; 31 *Id.* 517.

¹⁰ *Singleton v. St. Louis Mut. L. Ins. Co.*, 66 Mo. 63.

¹¹ *Penn. Mut. L. Ins. Co. v. Crane*, 134 Mass. 56.

that because of the fraud of one of the parties to the contract it does not express the actual agreement,¹ or a mistake.² When the contract is to pay as many dollars as there are members of the association, the number of members may be shown by parol in order to arrive at the measure of damages;³ or it may be shown by statements contained in an assessment notice;⁴ or by the number of certificates issued,⁵ or under a peculiar wording of the certificate, where it was agreed to pay a certain sum and not to exceed seventy-five per cent of the assessments collected, the beneficiary may recover without proving demand on the company to make assessments, or show that assessments have been made; or if made, the amount collected thereon.⁶ Parol evidence is admissible to complete the record of a meeting of a society, and its members are competent witnesses,⁷ and to contradict the records.⁸ Generally the records of the association are admissible in an action by the beneficiary of a member,⁹ but not letters written by officers of the defendant association discussing plaintiff's claim.¹⁰ Evi-

¹ *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203.

² *Ætna L. Ins. Co. v. Brodie*, 5 Can. Sup. Ct. 1; 20 L. Can. Jur. 286. See *ante*, § 458.

³ *St. Clair Co. Ben. Soc. v. Fietsam*, 97 Ill. 474; *Fairchild v. N. Eastern M. L. Assn.*, 51 Vt. 628.

⁴ *Fairchild v. N. Eastern M. L. Assn.*, *supra*.

⁵ *Neskern v. N. W. Endowment, etc., Ass.*, 30 Minn. 406; *Chaffey v. Equitable L. Assn.*, 2 N. Y. Supp. 481.

⁶ *Kansas Protec. Union v. Whitt*, 36 Kan. 760; 14 Pac. Rep. 275. See *ante*, § 458.

⁷ *Hamil v. Supreme Council, etc.*, 152 Pa. St. 537; 25 Atl. R. 645; *Backdahl v. Grand Lodge, etc.*, 46 Minn. 61; 48 N. W. R. 454.

⁸ *Supreme L. K. of H. v. Wickser*, 72 Tex. 257; 12 S. W. R. 175; *Hawkshaw v. Supreme Lodge, etc.*, 29 Fed. R. 770.

⁹ *Bagley v. Grand Lodge*, 131 Ill. 498; 22 N. E. R. 487.

¹⁰ *Bagley v. Grand Lodge, supra*. See also *Traders, etc., Co. v. Wagley*, 20 C. C. A. 588; 74 Fed. R. 457; 45 U. S. App. 39.

dence that insured joined other organizations at the same time is admissible to show fraud.¹

§ 466. **Canvassing, Documents, Prospectuses, Rules, etc.** — Published documents and rules of an insurance company in respect to the transaction of its business are admissible on the part of a policy holder in an action against it, although it is not shown that he was aware of their existence when the cause of action arose.² And it has been held that a prospectus of an insurance company may be given in evidence to modify the terms of the policy regarding payment of premium.³ Or for the purpose of showing an estoppel.⁴ But the statements of the prospectus do not imply a guaranty.⁵ But unless identified as issued by the company, circulars and prospectuses are clearly inadmissible.⁶

§ 467. **Evidence of Usage.** — Under some circumstances evidence of usage is admissible, as for example, the custom of receiving premiums after they were due,⁷ but usage must be proved by instances not opinions;⁸ and a custom

¹ *Whitmore v. Supreme Lodge*, 100 Mo. 36; 13 S. W. R. 495; *Smith v. National Ben. Soc.*, 123 N. Y. 85; 25 N. E. R. 197.

² *Walsh v. Ætna L. Ins. Co.*, 30 Ia. 133. But see *Clemmitt v. N. Y. L. Ins. Co.*, 76 Va. 355.

³ *Wood v. Dwarris*, 11 Exch. 493; 25 L. J. Ex. 129; *Wheelton v. Hardisty*, 8 El. & Bl. 232; 27 L. J. Q. B. 241; 92 E. C. L. R. 231; *Collett v. Morrison*, 9 Hare, 163; *Ruse v. Mut. L. Ins. Co.*, 24 N. Y. 653; *doubting s. c.* 23 N. Y. 516. See *ante*, § 363. See as to circulars of the company being inadmissible: *Continental Ins. Co. v. Hamilton*, 41 Ohio St. 274; *Clemmitt v. New York L. Ins. Co.*, 76 Va. 355.

⁴ *U. S. Life Ins. Co. v. Ross*, 159 Ill. 476; 42 N. E. R. 859; *reversg.* 57 Ill. 98.

⁵ *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478; 9 S. E. R. 1124. See also *Fowler v. Metropolitan L. Ins. Co.*, 13 N. Y. Supp. 755.

⁶ *Sleight v. Supreme Council, etc. (Ia.)*, 96 N. W. R. 1100.

⁷ *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15. But see *Franklin L. Ins. v. Sefton*, 53 Ind. 380; and *ante*, §§ 361, 431, 432.

⁸ *Hennessy v. New York M. M. Ins. Co.*, 1 Old (Nov. Sc.), 259.

is not proved by the testimony of a witness that in certain instances known to him a forfeiture was not insisted on. It must be shown that the custom was uniform.¹ A usage practiced by one company cannot be inferred to exist so as to bind another company;² nor, if the rights of parties depend upon the construction to be given a contract, can evidence of the custom and usage of the company and of the decisions of its officers respecting the construction be given.³

§ 468. **Construction of Insurance Policies** — We have already referred to the general rules for the construction of insurance contracts.⁴ The first is that they are to be construed liberally in favor of the assured and strongly against the insurer. As the Supreme Court of Vermont has said:⁵ “It is a fundamental rule in the law of insurance, that the policy shall be construed most strongly against the insurer, and liberally in favor of the assured. The policy is written by the insurers. They use their own language, and surround and barricade their liability under it with such defenses as they choose to adopt. Oftentimes their policies, instead of being simple, intelligible instruments that the average holder can understand and construe,

¹ *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479. See also *Ætna L. Ins. Co. v. Hartley*, 24 Ky. L. R. 57; 67 S. W. R. 19; 68 S. W. R. 1081.

² *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *American Ins. Co. v. Neiberger*, 74 Mo. 167.

³ *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509. See also *Brotherhood, etc. v. Greaser*, 108 Ill. App. 598.

⁴ See *ante*, §§ 177, 203, 224.

⁵ *Brink v. Merchants', etc., Insurance Co.*, 49 Vt. 457; *Hoffner v. Grand Lodge, etc.*, 41 M. A. 359. See also *American Surety Co. v. Pauly*, 170 U. S. 133; 18 S. C. R. 552; *Thompson v. Thorne*, 83 Mo. App. 241; *Mass. Ben. L. Ass. v. Robinson*, 104 Ga. 256; 30 S. E. R. 918; 42 L. R. A. 261; *McMaster v. New York L. Ins. Co.*, 183 U. S. 25; *reversg.* 99 Fed. R. 856; 40 C. C. A. 119; *Woodmen's Acc. Assn. v. Byers*, 62 Neb. 673; 87 N. W. R. 546; 55 L. R. A. 291; *McElfresh v. Oddfellows, etc., Assn.*, 21 Ind. App. 557; 52 N. E. R. 819.

are burdened with a great number of technical stipulations and conditions, buried under ingenious phraseology that reflects great credit upon the draughtsman, but leaves 'plain people' to learn its true import after their property is destroyed. Then they are informed that the policy is a mere technical notice of special matter to be given in evidence in answer to their claim for damages. There is obvious reason for the rule of liberal construction in favor of the man whose legal rights are to be extracted from such a labyrinth of mysticism." All the decisions of the courts in insurance cases, cited in the preceding pages, illustrate the universal application of this doctrine. The general rules for the construction of written contracts of course also apply. The courts will give the contract the same interpretation that the parties themselves have placed on it.¹ Contemporaneous literature may be looked to for explanation of terms used in the contract.²

§ 469. **Burden of Proof.** — In an action upon a life insurance policy, although the answers in the application are warranties, the burden of proof is on the defendant to show the falsity of any such answers in accordance with the general rule that the law does not require a party to prove a negative. As was said by the Supreme Court of the United States:³ "The number of questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such, that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of

¹ *Haydell v. Mut. R. F. L. Assn.*, 44 C. C. A. 169; 104 Fed. R. 718.

² *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. R. 163.

³ *Piedmont L. Ins. Co. v. Ewing*, 92 U. S. 377. See also *Mut. L. Ins. Co. v. Daviess*, 87 Ky. 541; 9 S. W. R. 812; *Elmer v. Mut. Ben. Assn.*, 19 N. Y. Supp. 289. A case apparently against authority is, *Fell v. John Hancock M. L. Ins. Co. (Conn.)*, 57 Atl. R. 175.

every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand, it is no hardship, that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded.”¹ The burden of establishing the failure to pay assessments is upon the defendant,² and that the assessment was duly

¹ *Insurance Co. v. Gridley*, 100 U. S. 614; *John Hancock M. L. Ins. Co. v. Daly*, 65 Ind. 6; *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212; 4 N. E. R. 582; *National Ben. Assn. v. Grautman*, 107 Ind. 288; 7 N. E. R. 233; *Granger's L. Ins. Co. v. Brown*, 57 Miss. 308; *Roach v. Ky. Mut. Security F. Co.*, 28 S. C. 431; 6 S. E. R. 286; *Boisblanc v. La. Equitable L. Ins. Co.*, 34 La. Ann. 1167; *Jones v. Brooklyn L. Ins. Co.*, 61 N. Y. 79; *Van Valkenburgh v. Am. Pop. L. Ins. Co.*, 70 N. Y. 605; *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236; *Mobile L. Ins. Co. v. Morris*, 3 Lea, 101; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *Grange Mill Co. v. Western Ass. Co.*, 118 Ill. 396; *Swick v. Home L. Ins. Co.*, 2 Dill. 160; *Holloman v. L. Ins. Co.*, 1 Woods, 674; *Clark v. Hamilton M. Ins. Co.*, 9 Gray, 148; *Trenton M. L. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Mut. Ben. L. Ins. Co. v. Wise*, 34 Md. 582; *N. Y. L. Ins. Co. v. Graham*, 2 Duv. 506; *Price v. Phoenix L. Ins. Co.*, 17 Minn. 497; *Penn. M. L. Ins. Co. v. Mechanics, etc., Co.*, 19 C. C. A. 286; 72 Fed. R. 413; 38 L. R. A. 33; *Osterman v. District Grand Lodge (Cal.)*, 43 Pac. R. 412; *Supreme Lodge, etc. v. Wollschlager*, 22 Colo. 213; 44 Pac. R. 598; *Chambers v. N. W. Mut. L. Ins. Co.*, 64 Minn. 495; 67 N. W. R. 367; *Grindle v. York M. A. Assn.*, 87 Me. 177; 32 Atl. R. 868; *Lampkin v. Travelers Ins. Co.*, 11 Colo. App. 249; 52 Pac. R. 1040; *National Union v. Thomas*, 10 App. D. C. 277; *O'Connell v. Supreme Council*, 102 Ga. 143; 28 S. E. R. 282; *Ingraham v. National Union*, 103 Ia. 395; 72 N. W. R. 559; *Fisher v. Fidelity M. L. Assn.*, 188 Pa. St. 1; 41 Atl. R. 467; *Fidelity M. L. Assn. v. Weise*, 182 Ill. 496; 55 N. E. R. 540; reversg. 80 Ill. App. 499.

² *Tobin v. West. M. A. Soc.*, 72 Ia. 261; 33 N. W. Rep. 663; *Dial v. Valley M. L. Assn.*, 29 S. C. 560; 8 S. E. R. 27.

made¹ and that a warranty of good health at time of reinstatement was false,² and such burden does not shift by the introduction of evidence which, if unexplained, would be conclusive.³ Where insurable interest is denied the burden of proof is on the plaintiff to prove it;⁴ and the beneficiary of a member of a benevolent society has the burden of proof to show that the member was in good standing at the time of his death, the allegation of the petition to that effect being denied by the answer.⁵ The parties who claim under the assignment of a benefit certificate, in its inception payable to a party designated by name, must show that the transfer was in accordance with the laws of the society issuing it,⁶ and where a policy is payable to a number of persons, the burden of proving that any one of them survived the others is upon him who asserts it.⁷ If a matter is peculiarly within the knowledge of defendant the burden is on him to prove it.⁸

§ 469a. **Evidence of Age.**—The Supreme Court Missouri has said: ⁹ “Where the age of a party is in issue

¹ *Shea v. Mass. Ben. Assn.*, 160 Mass. 289; 35 N. E. R. 855. See also *Stewart v. Grand Lodge*, 100 Tenn. 267; 46 S. W. R. 579; *Masons Frat. A. Assn. v. Riley*, 65 Ark. 261; 45 S. W. R. 684.

² *Spencer v. Citizens Mut. L. Ins. Assn.*, 142 N. Y. 505; 37 N. E. R. 617.

³ *Spencer v. Citizens Mut. L. Ins. Co.*, *supra*. See also *Redmond v. Maryland Ben. Assn.*, 78 Hun, 104; 28 N. Y. Supp. 1078.

⁴ *Hooper v. Robinson*, 98 U. S. 528; *Singleton v. St. Louis Mut. L. Ins. Co.*, 66 Mo. 63.

⁵ *Siebert v. Supreme Council, etc.*, 23 Mo. App. 268. But see *Tobin v. Western M. A. Soc., etc.*, *supra*.

⁶ *Henry v. Trustees Grand Lodge, etc.*, 15 Bradw. 151.

⁷ *Fuller v. Linzee*, 135 Mass. 468.

⁸ *Guau v. Masons, etc., Assn.*, 109 Mich. 527; 67 N. W. R. 546; *International Order, etc. v. Boswell* (Tex. Civ. A.), 48 S. W. R. 1108; *Frame v. Sovereign Camp, etc.*, 67 Mo. App. 127.

⁹ *Elsner v. K. & L. of H.*, 98 Mo. 640-645, but see *Valley M. L. Assn. v. Teewalt*, 79 Va. 421.

the court may admit an expression of opinion by a witness as to age based on the appearance of the party at the time, accompanied with a description of the appearance from which such opinion was formed. That such evidence is competent we do not doubt.” A statement in a will of the age, or of a person’s birth, is *prima facie* evidence of his age.¹ It is said that evidence of reputation is inadmissible to prove a person’s age.² Family discussion as to birthday and acts done on the reputed day are evidence for the jury as to the age of an infant.³ And testimony of relatives as to comparative age.⁴ The Supreme Court of Michigan has said,⁵ that a sworn and examined extract from the parish record of a Catholic Church, showing the baptism of the deceased party and reciting names of her parents with their description and a statement of her age, supported by the evidence of the priest that such a record was required to be kept by the rules of the church, which record is thirty years old, is admissible as evidence of age. And so as to a leaf, sworn to as taken after his death from a soldier’s private record book, required to be kept by soldiers in the British service, showing names of his father and his wife, and names, ages and birthplaces of all his children. In this case⁶ the sister swore to the age of the deceased, by reference to her own age, as several years older than the deceased. The court says that therejection of such proofs would be disastrous; they are relied upon by the whole community. A letter from a husband was admitted as evidence of age;⁷ and a leaf from a Bible;⁸ and an entry

¹ *Vulliamy v. Huskisson*, 3 Y. & C. 80.

² *Collough v. Smyth*, 15 Ir. Ch. 347; 10 L. T. (N. S.) 918.

³ *Rex v. Hayes*, 3 Cox C. C. 226.

⁴ *Butler v. Supreme Council*, 43 App. Div. 531; 60 N. Y. Supp. 70.

⁵ *Hunt v. Order of Chosen Friends*, 64 Mich. 671; 31 N. W. R. 576

⁶ *Hunt v. Chosen Friends*, *supra*.

⁷ *Elliott v. Pearsol*, 26 U. S. (1 Peters) 328.

⁸ *Douglass v. Sanders*, 2 Dall. 116.

in a family Bible is admissible.¹ Hearsay is clearly admissible as to facts of family history, such as birth, marriage, relative age, relationship, etc.² So is a record of naturalization.³ Church registers are not admissible in evidence except by statutory provision, unless the law of the country or State in which they are kept recognizes them as documents of an authentic and public nature.⁴ A parish register showing the date of a child's baptism is not evidence of the date of his birth or of his identity.⁵ A register of baptism taken by itself, is only evidence of that fact. Mention of a child's age in the register is not proof of the date of his birth. In all these and similar cases the register is no proof of the identity of the parties. But the fact and identity must be established by other evidence.⁶ The effect of a baptismal record is not overcome by parol evidence.⁷

¹ *Amey v. Cockey* (Md.), 19 Wash. L. 163.

² *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45; 27 S. W. R. 286, a recent case. See also *Abbott's Tr. Evidence*, pp. 90-102. The subject is also discussed in *Greenleaf on Evidence*, 104-116, 493. Other cases bearing on the subject, or where age was in controversy, are *United Brethren v. White*, 100 Pa. St. 12; *Alabama, etc., Ins. Co. v. Mobile & Co.*, 81 Ala. 329; 1 *Southern*, 561; *Hartigan v. International & Co.*, 8 L. Ca. Juris. 203; *Mutual, etc., Co. v. Webster*, 25 Can. L. Journal (N. S.), 206; *Deutscher v. Berger*, 35 Ill. App. 112; *Watson v. Brewster*, 1 Pa. St. 381; *Greenleaf v. R. R. Co.*, 30 La. Ann. 301; *Life Ins. Co. v. Wilkinson*, 53 Georgia, 535; *Witcher v. McLaughlin*, 115 Mass. 167; *North Brookfield v. Warner*, 16 Gray, 174; *Am. L. Ins. Co. v. Rosebaugh*, 77 Pa. St. 516.

³ *Dolan v. Mut. Reserve, etc., Assn.*, 173 Mass. 197; 53 N. E. R. 398; *Supreme Conclave, etc., v. Saylor*, 79 Miss. 62; 29 Sou. R. 790 and 32 Sou. R. 50.

⁴ *Childress v. Cutler*, 16 Mo. 24; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521; *Lewis v. Marshall*, 30 U. S. (5 Peters) 470.

⁵ *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521; *McGuirk v. Mut. Benefit, etc.*, 20 N. Y. Supp. 908.

⁶ *Clark v. Trinity Church*, 5 Watts & Serg. 266; *Huet v. La Mesurier*, 1 Cox. R. 275; *Childress v. Cutler*, 16 Mo. 24. As to copy of foreign register, see *Kingston v. Lesley*, 10 S. & R. 389. It must be shown that the register was one required to be kept.

⁷ *Hartshorn v. Metropolitan L. Ins. Co.*, 55 App. Div. 471; 67 N. Y. Supp. 13. See also *Meehan v. Supreme Council, etc.*, 88 N. Y. Supp. 821.

An entry in the minute book of a lodge of Odd-Fellows, of which insured was a member, made prior to the making of the contract, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, has been held properly excluded as being hearsay.¹ But a mere statement of the insured to a clerk of the Probate Court is not evidence;² nor is a coffin plate or obituary notice.³ And so with a memorandum purporting to record the date of birth where no evidence was offered to show in whose handwriting such memorandum was.⁴

§ 470. **Evidence of Death.** — In an action on a policy of life insurance the burden is on the plaintiff to prove the death of the person whose life is insured.⁵ The general rule is that letters of administration are *prima facie* evidence of the death of the person on whose estate they are granted, but the presumption of death raised thereby is weak and inconclusive, and may be rebutted by slight evidence.⁶ But the Supreme Court of the United States, in accordance with the English doctrine, disapproves of this doctrine and has held to the contrary.⁷ Death, like other facts, may be established by circumstantial evidence, when

¹ Conn. Mutual L. Ins. Co. v. Schwenk, 94 U. S. 593.

² McCarthy v. Catholic Order, etc., 102 Tenn. 345; 52 S. W. R. 142.

³ Dinan v. Supreme Council, etc., 201 Pac. St. 363; 50 Atl. R. 999. As to other cases where the evidence was held sufficient see Supreme Conclave, etc., v. Sayler, 79 Miss. 62; 29 Sou. R. 790; 32 Sou. R. 50.

⁴ National L. Assn. v. Sturtevant, 29 N. Y. Supp. 529.

⁵ National Ben. Assn. v. Grauman, 107 Ind. 288; 7 N. E. R. 233; Wackerle v. Mutual Life Ins. Co., 14 Fed. Rep. 23; 4 McC. 508.

⁶ Tisdale v. Conn. Mut. L. Ins. Co., 26 Ia. 170; Lancaster v. Washington L. Ins. Co., 62 Mo. 121; Cunningham v. Smith, 70 Pa. St. 450; Newman v. Jenkins, 10 Pick. 515; Jaffers v. Radcliff, 10 N. H. 242; McKimm v. Biddle, 2 Dall. 100; Munro v. Merchant, 26 Barb. 397.

⁷ Mut. Ben. L. Ins. Co. v. Tisdale, 91 U. S. 241; Moons v. De Bernales, 1 Ru-s. 307; Clayton v. Gresham, 10 Ves. 288; Leach v. Leach, 8 Jur. 211.

direct evidence is not attainable; and when absence without tidings concurs with other attendant and supporting circumstances to produce the conviction that the party is dead, such proof is all that can be required.¹ And it is said that the disappearance of a man "under circumstances of shipwreck, or earthquake, or battle, or explosion, or like perils, might well produce a conviction that he is dead."² The Supreme Court of Michigan also has said that: "There is no doctrine which in civil cases requires death to be proved by any more conclusive or peculiar evidence than any other fact material to recovery in an action. If the testimony satisfies the court or jury passing on the facts, and is reasonably sufficient, and compels belief, the conclusion is certainly lawful. * * * A sudden disappearance, and the failure to discover any traces of a man who, if living, could not easily have gone unnoticed, and who was in such a physical and mental condition, as to excite the anxiety of his friends upon this very subject, cannot be said to afford no evidence tending to prove his death."³ The cases above cited show that a presumption of the death of a person may arise from circumstances of disappearance and being brought in contact with specific perils, although seven years have not elapsed. The usual presumption of death from absence of seven years without tidings also prevails in life insurance cases, but slight evidence has been held to rebut the presumption.⁴ Letters written by the

¹ *Boyd v. New England M. L. Ins. Co.*, 34 La. Ann. 848; *Supreme Council Cath. Benev. L. v. Boyle*, 10 Ind. App. 301; 37 N. E. R. 1105; *Carpenter v. Supreme Council, etc.*, 79 Mo. App. 597; *Fidelity M. L. Assn. v. Mettler*, 185 U. S. 308; 46 L. Ed. 922.

² *Idem*: see cases cited just below.

³ *John Hancock M. L. Ins. Co. v. Moore*, 34 Mich. 41; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Sensenderfer v. Pacific Mut. L. Ins. Co.*, 19 Fed. Rep. 68; *Whiteley v. Equitable L. A. Soc.*, 72 Wis. 170; 39 N. W. Rep. 369.

⁴ *Prudential Assurance Co. v. Edmonds*, L. R. 2 App. Cas. 487.

assured shortly before the disappearance are admissible to show the intent.¹ The Supreme Court of Missouri has held that in cases where death is presumed from an absence of seven years without tidings, there is no presumption of death at any particular time during these seven years;² but it has also been said in the same State that no facts appearing except that of the absence of a person for seven years without being heard from, it will be presumed that he died on the last day of the seven years.³ A more exact statement of the rule is that a person is presumed to be alive for seven years from the time he was last heard of by persons who would likely have heard from him if alive, but, after that time has elapsed the presumption of life ceases and that of death arises. Where, however, the exact time of death is to be proved the burden of proof lies on the person who claims the right dependent upon the time of death, which is to be proved like other facts, as there is no presumption that death occurred at any time during the seven years. The presumption of death from absence is one strengthened or diminished by facts bearing upon the disappearance and is not an absolute one, except as provided by statute.⁴ Certificate of attend-

¹ *Mutual L. Ins. Co. v. Hillman*, 145 U. S. 285; 12 S. C. R. 910. For various rulings on evidence in case of disappearance: *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751; 12 S. E. R. 18.

² *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Hancock v. American L. Ins. Co.*, *Id.* 26.

³ *Kauz v. Great Council, etc.*, 13 Mo. App. 341.

⁴ *Whiteley v. Equitable Life Ass. Soc.*, 72 Wis. 170; 39 N. W. R. 369; *Biegeler v. Supreme Council, A. L. H.* 75 Mo. App. 419; *Dickens v. Miller*, 12 Mo. App. 413; *Tisdale v. Conn. Mut. L. Ins. Co.*, 26 Ia. 170; and the subject is fully discussed by John D. Lawson in two articles in the *Albany Law Journal*, Vol. 29, 426 and 464, appended as a note to Hoyt v. Newb Id (45 N. J. L. 219); 46 Am. R. 761. See also *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285; 71 Pac. R. 348; *Johnson v. Penn. R. Co.*, 43 App. Div. 453; 60 N. Y. Supp. 129; reversing 26 Misc. 241; 55 N. Y. Supp. 1050; *Kelly v. Supreme Council, etc.*, 46 App. Div. 79; 61 N. Y. Supp. 394. As to special conditions, *Porter v. Home L. Ins. Co.*, 114 Ga.

ing physician as to the cause of death filed with the board of health, is not admissible to show cause of death.¹ Nor the verdict at a coroner's inquest.²

§ 471. **Proofs of Loss as Evidence.** — The preponderance of authority is in favor of the view that proofs of loss are admissible in evidence for the sole purpose of showing that the requirements of the policy concerning them have been complied with.³ But, although this is true, the Supreme Court of the United States has said that preliminary proofs, presented in compliance with a condition of the policy, are admissible as *prima facie* evidence of the facts stated therein against insured and on behalf of insurer.⁴ And if not contradicted require, if they show a breach of warranty or conditions of the policy, a judgment for de-

937; 41 S. E. R. 45. As to post-mortem see *Sun Acc. Assn. v. Olsen*, 59 Ill. App. 217. As to survivorship see *U. S. Casualty Co. v. Kacer*, 169 Mo. 301; 58 L. R. A. 436; 69 S. W. R. 370; *Supreme Council, etc. v. Kacer*, 96 Mo. App. 93; 69 S. W. R. 671. See also *ante*, § 243a for questions of survivorship and *ante*, § 336a as to evidence of suicide.

¹ *McKinley v. Metropolitan L. Ins. Co.*, 26 N. Y. Supp. 63; *Buffalo, etc. v. Knights Templar, etc.*, 126 N. Y. 450; 27 N. E. R. 942.

² *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611; 43 N. E. R. 277; *Maier v. Mass. Ben. Assn.*, 107 Mich. 687; 65 N. W. R. 552; *Cox v. Royal Tribe of Joseph*, 42 Oreg. 365; 71 Pac. R. 73; 60 L. R. A. 620. See *post*, § 471.

³ *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302; *Breckinridge v. American Central F. Ins. Co.*, 87 Mo. 62; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Imperial F. Ins. Co. v. Shrimmer*, 96 *Id.* 580; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 402; *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188; 44 *Id.* 269; *Baile v. Ins. Co.*, 73 Mo. 371; *Newmark v. Liverpool, etc., Ins. Co.*, 30 Mo. 160. But see *Moore v. Protection Ins. Co.*, 29 Me. 97; *Howard v. City F. Ins. Co.*, 4 Denio, 502; *Lawrence v. Mut. L. Ins. Co.*, 5 Bradw. 280; *Covenant M. B. Ass. v. Hoffman*, 110 Ill. 603; *People's Mut. Acc. Assn. v. Smith*, 126 Pa. St. 317; 17 Atl. R. 605; *Travelers Ins. Co. v. Nicklas*, 88 Md. 470; 41 Atl. R. 906.

⁴ *Mut. Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380; *Mut. L. Ins. Co. v. Newton*, 22 Wall. 32; *Dewey v. Aetna L. Ins. Co.*, 38 Fed. R. 650.

feudant.¹ These last mentioned cases and others hold that the statements made by the assured in the proofs of loss are admissions, and may be considered by the jury for what they are worth,² and the modern rule is probably that the proofs of loss furnished by the assured are not only evidence that the condition of the policy requiring them has been complied with, but are also to be regarded as admissions and prima facie evidence of the facts therein stated. But the party furnishing them may show that statements in the proofs of loss were erroneous or inadvertently made, and the mistake can be shown by parol.³ This

¹ *Hanna v. Conn. Mut. L. Ins. Co.*, 150 N. Y. 526; 44 N. E. R. 1099.

² *Keels v. Mut. Reserve F. Life Assn.*, 29 Fed. Rep. 198; *McMaster v. Insurance Co.*, 55 N. Y. 228; *Parmelee v. Ins. Co.*, 54 N. Y. 193. But see *Campbell v. Charter Oak Ins. Co.*, 10 Allen, 218; *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507; *Worsley v. Wood*, 6 T. R. 710; *Bentz v. N. W. Aid Assn.*, 40 Minn. 202; 41 N. W. R. 1037.

³ *Conn. Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593; *Behr v. Conn. M. L. Ins. Co.*, 2 Flip. 692; 4 Fed. Rep. 357; *Neill v. Am. Popular L. Ins. Co.*, 10 Jones & Sp. 259; *Pittsburg Ins. Co. v. Frazee*, 107 Pa. St. 521; *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220; *Castner v. Farmers' M. F. Ins. Co.*, 50 Mich. 273; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; *Smiley v. Citizens' F. & L. Ins. Co.*, 14 W. Va. 33; *Waldeck v. Springfield F. & M. Ins. Co.*, 56 Wis. 95; *New Orleans Ins. Co. v. O'Brian*, 8 Ky. L. Rep. 785; *Day v. Mut. Ben. L. Ins. Co.*, 1 McA. 598; *Hoffman v. Aetna Ins. Co.*, 1 Rob. 501; 32 N. Y. 405; *Parmelee v. Hoffman F. Ins. Co.*, 54 N. Y. 193; *Hayes v. Union Mut. L. Ass. Co.*, 44 Up. Can. Q. B. 360; *McMaster v. Ins. Co.*, 55 N. Y. 222; *Aetna Ins. Co. v. Stevens*, 48 Ill. 31; *Conn. Mut. L. Ins. Co. v. Siegel*, 9 Bush, 450; *Germania F. Ins. Co. v. Curran*, 8 Kan. 9; *Sargent v. Home Ben. Assn.*, 35 Fed. R. 711; *Bachmeyer v. Mut. R. F. L. Assn.*, 82 Wis. 255; 52 N. W. R. 101; 58 N. W. R. 399; *Walther v. Mut. Ins. Co.*, 65 Cal. 417; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189; 15 South. R. 388; *Redmond v. Industrial Ben. Assn.*, 28 N. Y. Supp. 1075; affirmed 150 N. Y. 167; 44 N. E. R. 769; *Union M. L. Ins. Co. v. Payne*, 45 C. C. A. 193; 105 Fed. R. 172; *Wells v. Metropolitan L.*, 163 N. Y. 572; 57 N. E. R. 1128; *Denver L. Ins. Co. v. Price* (Colo. App.), 69 Pac. R. 313; *Modern Woodmen v. Von Wald*, 6 Kan. App. 231; 49 Pac. R. 782; *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302; 41 N. E. R. 303; *Hassencamp v. Mutual Ben. L. Ins. Co.*, 56 C. C. A. 625; 120 Fed. R. 475; *Supreme Tent, etc. v. Stensland*, 206 Ill. 124; 68 N. E. R. 1098.

is especially true if the policy provides that proofs of loss shall be evidence for the company.¹ In Massachusetts it is held that if the insured wishes to contradict the proofs of loss he must serve amended proofs on the insurer,² but this doctrine is somewhat qualified in a later case.³ Proofs of loss purporting to be executed by the beneficiary need not be proved.⁴ Statements made by the physician attending the insured, contained in the proofs of death, are privileged and inadmissible to show that false answers were made in the application. By including such statements in the proofs the assured did not consent that they might be used against her.⁵ Such statements are wholly inadmissible if based on hearsay,⁶ and it has been held that a certificate of a physician included in the proofs of loss is not evidence of the fact it states, but is a suggestion entitled to weight in considering insurer's conduct in resisting payment.⁷ The proceedings had on coroner's inquest are inadmissible except to show that an inquest was had and though annexed to proofs of loss is not an admission of cause of death.⁸

¹ *Kepp v. Metropolitan L. Ins. Co.*, 47 App. Div. 298; 58 N. Y. Supp. 494; *Donnell v. Metropolitan Life Ins. Co.*, 86 N. Y. Supp. 790; *Howard v. Metropolitan L. Ins. Co.*, 18 Misc. 74; 41 N. Y. Supp. 33.

² *Campbell v. Ins. Co.*, 10 Allen, 213. See also *Cook v. Lion F. Ins. Co.*, 67 Cal. 368.

³ *City Five Cents, etc., Bank v. Pennsylvania F. Ins. Co.*, 122 Mass. 165.

⁴ *Wall v. Royal Society, etc.*, 179 Pa. St. 355; 36 Atl. R. 748.

⁵ *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670; *Railway Passenger, etc., Assn. v. Robinson*, 147 Ill. 138; 35 N. E. R. 168; *Helwig v. Mut. L. Ins. Co.*, 12 N. Y. Supp. 172; *Buffalo, etc., Co. v. Knight-Templar, etc., Assn.*, 126 N. Y. 450; 27 N. E. R. 942; *Redmond v. Industrial Ben. Assn.*, 28 N. Y. Supp. 1075; affirmed 150 N. Y. 167; 44 N. E. R. 769.

⁶ *Insurance Co. v. Schmidt*, 40 Ohio St. 112.

⁷ *Davey v. Aetna L. Ins. Co.*, 20 Fed. Rep. 482. See also *Cushman v. United States L. Ins. Co.*, 70 N. Y. 72.

⁸ *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567; *Davey v. Aetna L.*

§ 472. **Foreign Insurance Companies may Remove Causes to Federal Courts.**—Foreign insurance companies may remove cases from the State to the Federal courts under the acts of Congress in the same way as natural persons.¹ An agreement to abstain, in all cases, from resorting to the courts of the United States is void as against public policy, and a State statute, which requires such an agreement as a condition for being allowed to do business in such State is in conflict with the constitution of the United States,² but a State has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company, chartered by another State, or to exclude such company altogether, or, having given a license to revoke it, with or without cause. If a company, in violation of its agreement not to resort to the United States courts, does remove causes there, the State may revoke its license, and its motives or means of enforcement of its wishes are not the subject of judicial inquiry.³

§ 473. **Retaliatory Legislation.**—Many States have in their insurance laws, prescribing the terms upon which foreign corporations are allowed to do business within their limits, a retaliatory provision; that is, they declare that if

Ins. Co., 36 Fed. R. 650; *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76; 11 S. C. R. 720; *Supreme Council, etc. v. Brashears*, 89 Md. 624; 43 Atl. R. 866; *Louis v. Conn. Mut. L. Ins. Co.*, 58 App. D. 137; 68 N. Y. Supp. 683; *Wasey v. Travelers Ins. Co.*, 126 Mich. 119; 85 N. W. R. 459. See also *ante*, § 336a. See valuable note on the subject to *John Hancock M. L. Ins. Co. v. Dick*, 117 Mich. 518; 76 N. W. R. 9; 44 L. R. A. 846.

¹ *Insurance Company v. Morse*, 20 Wall. 445.

² *Ins. Co. v. Morse*, *supra*.

³ *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *State v. Doyle*, 40 Wis. 175; *Tennessee, etc. v. Davis*, 100 U. S. 257. See also *Cable v. U. S. L. Ins. Co.*, 191 U. S. 288; *Riggs v. Union L. Ins. Co. (C. C. A.)*, 129 Fed. R. 207.

any other State shall impose other or greater taxes, fees, licenses, deposits, etc., upon insurance companies or their agents, than those imposed by the laws of the State in question, then such taxes, fees, licenses, etc., shall be imposed upon the insurance companies of such other State or the agents of such companies. There seems to be some question whether such retaliatory features are not unconstitutional, because in violation of the principle that all taxation must be uniform,¹ although they have been sustained in at least one case.² Quo warranto proceedings lie to oust a foreign corporation doing business in a State unlawfully.³ We may, however, well leave the discussion of this question to works on taxation or constitutional law.

§ 474. **Insurance Companies Subject to Insolvency and Bankruptcy Laws Like Other Corporations.**— Like other corporations, insurance companies are subject to the insolvency, assignment and bankruptcy laws of the State of their domicile, unless specially exempted by statute. If not thus excepted, no distinctions should, on principle, be made between insurance organizations and those for other purposes;⁴ and a mutual life insurance company has been held to be “a business corporation” within the meaning of the bankrupt act.⁵ Accordingly, a life insurance com-

¹ *Clark v. Mobile*, 67 Ala. 217. Other cases bearing on the subject are *Seiders v. Merchants' L. Assn.*, 93 Tex. 194; 54 S. W. R. 753; *Ins. Co. v. Durfee*, 164 Ill. 186; 45 N. E. R. 441; *State v. Ackerman*, 51 Ohio St. 163; 37 N. E. R. 828; 24 L. R. A. 298. See also *People's M. B. Soc. v. Lester*, 105 Mich. 716; 63 N. W. R. 977.

² *State v. Insurance Co. of N. A.*, 115 Ind. 257; 17 N. East Rep. 574; and see *Doyle v. Continental Ins. Co.*, 94 U. S. 535, *supra*.

³ *State v. Western Union, etc., Soc.*, 47 Ohio St. 167; 24 N. E. R. 392. *State v. Fidelity, etc., Co.*, 49 Ohio St. 440; 31 N. E. R. 658; *State v. Fidelity, etc., Co.*, 39 Minn. 538; 41 N. W. R. 108.

⁴ *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258; *Reed v. Independent Ins. Co.*, 1 Ins. L. J. 735.

⁵ *In re Hercules M. L. Ass. Soc.*, 1 Ins. L. J. 875.

pany can make a general assignment for the benefit of creditors.¹

§ 475. **Winding up by Insurance Commissioner: Special Deposit with State: Insolvency of Mutual Company: Effect of Charter Provisions.**—In most, if not all, States of the Union the business of insurance is regulated by statute, and is under the supervision of an officer generally known as the insurance commissioner. These laws in nearly all cases provide for certain proceedings to be taken upon the insolvency of the companies and the manner of disposition of the special fund deposited with the department for domestic policy holders. These insurance statutes are similar in many respects and, in New York especially, have been construed in whole or in part by the courts. It is not thought necessary to examine these statutes or to refer to all of the decisions respecting them.² In Ohio it has been said by the Supreme Court of that State that the deposit made by the company with the department of insurance is for the benefit of the policy holders only, and not for the security of the general creditors of the company, and should be applied *pro rata* on the claims of such policy holders, and that general creditors have no claim upon it. In event of insolvency, after the policy holders are paid in full, then the remaining securities are liable to the rights of the company generally.³ In Mississippi it has been held that the fund deposited with the State by a foreign insurance company is intended as a security to protect policies issued to citizens of that State,

¹ *McDonnell v. Ala. Gold L. Ins. Co.*, 85 Ala. 401; 5 South. R. 120. In this case various points concerning rights of policy holders are discussed. See also *Betts v. Conn. L. Ind. Co.* (Conn.), 56 Atl. R. 617.

² *Swan v. Mut. Reserve F. L. Assn.*, 20 App. Div. 255; 46 N. Y. Supp. 841; reversg. 41 N. Y. Supp. 444; *Perry v. Mut. Reserve, etc.*, 58 N. Y. Supp. 844.

³ *Falkenbach v. Patterson*, 43 Ohio St. 359.

by agents appointed in the mode prescribed by the statute, and doing business in that State. And if a citizen of that State take out a policy in such company from an agent residing and doing business out of the State he has no claim upon the deposit in the treasury of the State, but is to be regarded as having elected to look rather to the general assets of the company than to such special fund.¹ A judgment creditor acquires no priority over others as against the deposit with the insurance commissioner.² All policy holders of a mutual life insurance company, whether residents of the company's domicile or not, are presumed to know the terms of its charter, and the laws regulating its existence, and are bound thereby, and in the absence of special provisions in the laws of the State, other than such domicile, where it may have property, attaching policy holders can claim no lien on such property, though residents of the State where such property is situated; but, if the laws of the domicile of the company provide for the winding up of the company, the sequestration of its property, the allowance of the claims of policy holders and an equitable distribution of the fund, such attaching creditors must be remitted to their share of the equitable distribution under the proceedings previously commenced in the State of the domicile of the company.³ The claims for death losses stand on no different basis

¹ *Piedmont & Arlington Life Ins. Co. v. Wallin*, 58 Miss. 1.

² *Smith v. Maine Acc. Assn.*, 86 Me. 229; 29 Atl. R. 991.

³ *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197; *Relf v. Rundle*, 103 U. S. 222; *Rundle v. Life Association*, 10 Fed. Rep. 720; 4 Woods, 94; *Davis v. Life Assn.*, 11 Fed. Rep. 780; *Taylor v. Life Assn.*, 13 Fed. Rep. 493; 3 Fed. Rep. 465. As to ouster of association of individuals doing an accident insurance business, see *State v. Ackerman* (Guaranty and Accident Lloyd's), 51 Ohio St. 163; 37 N. E. R. 828. Other points are discussed in *Lowery v. State L. Ins. Co.*, 153 Ind. 100; 54 N. E. R. 442; *Clark v. Mut. Reserve, etc.*, 14 App. D. C. 154; *State v. Matthews*, 64 Ohio St. 419; 60 N. E. R. 605.

than those of living policy holders, the same principle governs both.¹

§ 476. Attachments of Company's Property by Policy Holders. — The general property of a life insurance company in States other than that of its domicile is probably liable to attachment by policy holders of the State where such property is situated, if the company is not a mutual one, and possibly even if it is mutual, unless the charter or laws of the domicile of the corporation provide for winding it up if insolvent.² In a case in Virginia where certain creditors, policy holders, attached the property of the company, and brought bills to enforce their liens, it was held,³ that the attachments did not inure to the benefit of all the policy holders, whether parties to the suit or not, but the company being insolvent at the time of attachment, the complainants were entitled to recover, and no subsequent condition in the affairs of the company effected by other policy holders could defeat their recovery. Further, that each policy holder was entitled to a sum of money, which, on the day of the company's insolvency, would purchase from a solvent company a policy of the same kind, for the same amount and the same rate of premium. This sum is to be ascertained by treating the difference between the premiums paid the company and the premiums to be paid the new company as an annuity for the assured's expecta-

¹ *Weingartner v. Charter Oak L. Ins. Co.*, 32 Fed. Rep. 314; *Ellerbe v. Farmers', etc., Aid Assn.*, 106 Mo. 13; *Ellerbe v. Masonic A. Assn.*, 114 Mo. 501; 21 S. W. 843. See *ante*, §§ 377, 386.

² See last section. Also *Frowert v. Blank*, 199 Pa. St. 600; 49 Atl. R. 302, where it is held that an attachment will lie notwithstanding the appointment of a receiver in another State. See also *Failey v. Fee*, 83 Md. 93; 34 Atl. R. 839; 32 L. R. A. 311; and *Atty.-General v. Mass. Ben. Assn.*, 173 Mass. 378; 53 N. E. R. 879.

³ *Universal L. Ins. Co. v. Binford*, 76 Va. 103.

tion of life and calculating the cash value.¹ Attachments have also been sustained in other States.²

§ 477. **Receivers of Insurance Companies.**— When a company has reinsured all its risks, so that it has no income except a nominal amount, and its officers continue to draw large salaries, it will be treated as practically out of business and a receiver will be appointed.³ Generally, unless there are special provisions in the statutes regulating action in regard to insolvent life insurance companies, the same principles are applied as in the case of other corporations so far as the appointment of receivers is concerned. A decree of a court of competent jurisdiction dissolving a corporation and appointing a receiver vests in the latter all the property of the corporation, and such appointment cannot be questioned collaterally. The receiver represents both the corporation and creditors and stockholders, and in his character as trustee he may maintain an action to set aside illegal or fraudulent transfers of the property made by its officers, and to recover the assets outstanding or misapplied. His possession is that of the court, whose officer he is, and he cannot be sued at law without its consent.⁵ He has no power to waive proofs of loss or any legal defense.⁶ He

¹ In re *Albert Life Assn.*, 9 L. R. Eq. 708; 39 L. J. Ch. 539; 22 L. T. 697, 18 W. R. 1097.

² *Life Assn. v. Fassett*, 102 Ill. 315; *City Ins. Co. v. Commercial Bank*, etc., 68 Ill. 348.

³ *Treat v. Pennsylvania L. Ins. Co.*, 203 Pa. St. 21; 52 Atl. R. 60.

⁴ *Attorney-General v. Guardian M. L. Ins. Co.*, 77 N. Y. 272. Generally on this subject see *Miller's Appeal* (Pa.), 39 Atl. R. 660; *Commonwealth v. Am. L. Ins. Co.*, 170 Pa. St. 170; 32 Atl. R. 405; *Meloy v. Whitaker*, 61 N. J. L. 602; 40 Atl. R. 593; *affg.* 38 Atl. R. 840; *In re Order Touti*, 173 Pa. St. 464; 34 Atl. R. 440; *Knowlton v. Mass. Ben. L. Assn.*, 171 Mass. 193; 50 N. E. R. 520; *People v. Commercial Alliance L. Ins. Co.*, 154 N. Y. 95; 47 N. E. R. 968. As to right to sue for defalcation of officer, *Mason v. Henry*, 152 N. Y. 529; 46 N. E. R. 837.

⁵ *Spining v. Ohio L., etc., Co.*, 2 Dis. S. C. Cin. 336.

⁶ *Evans v. Tri-Mountain Ins. Co.*, 9 Allen, 329; *McEvers v. Lawrence*, Hoff. Ch. 172.

can sue in a foreign jurisdiction to recover assets,¹ but has no other or greater rights as against its policy-holders, than the company.² Receivers of insurance companies generally are governed by the same rules which apply in the case of those of other corporations, and further information concerning them must be sought in the special treatises relating to that subject. When a receiver is appointed for a life insurance company and its business arrested, the value of all claims against it are to be computed from the time of the halt so called.³ A receivership cancels all policies.⁴ If a policy holder die after the receivership, but before the time of presentment of claims has expired, his claim is to be considered as matured and its full amount, and not the reserve, is the basis for allowance;⁵ and it seems that if, after the time for allowance of demands has expired, a policy holder should die, it is discretionary with the court whether or not the allowance should be reopened.⁶

§ 478. Insolvent Life Insurance Companies: Status of Policy Holders. — When a life insurance company becomes insolvent and is placed in the custody of a receiver, its policy holders are not to be considered partners, but creditors, to whom it is liable for breach of the contract implied in its policies that it will receive premiums subse-

¹ *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Ellis v. Boston, etc., R. R. Co.*, 107 Mass. 1; *Wilmer v. Atlantic, etc., Co.*, 2 Woods, 418; *Bagby v. Atlantic, etc., R. R. Co.*, 86 Pa. St. 291; *Hurd v. City of Elizabeth*, 41 N. J. L. 1.

² *Savage v. Medbury*, 19 N. Y. 32; *Lycoming F. Ins. Co. v. Langley*, *supra*.

³ *Attorney-General v. North Am. L. Ins. Co.*, 82 N. Y. 172.

⁴ *Davis v. Shearer*, 90 Wis. 250; 62 N. W. R. 1050. See also *In re Wisconsin, etc., Co.*, 101 Wis. 1; 76 N. W. R. 775; 42 L. R. A. 360 and note.

⁵ *People v. Security L. Ins. Co.*, 78 N. Y. 114.

⁶ *Attorney-General v. Continental L. Ins. Co.*, 88 N. Y. 77. But see *Dean's Appeal*, 98 Pa. St. 101.

quently accruing, so as to keep the policy holder constantly insured, and so as to keep on hand the reserve required by law and maintain its engagements. The damage of the policy holder is the value of the policy destroyed, and to ascertain this, resort may properly be had to tables used in the business of life insurance showing the average expectancy of life. All policy holders are to be treated alike, although the health of some may have become so impaired that no reinsurance can be effected. Unmatured paid-up policies have no preference and annuities are to have their present value computed according to the tables in ordinary use. Death claims, also, are not preferred, but if a policy holder die after the insolvency and receivership, but before the time of presentment of proofs, the damage is the full amount of the policy, less a proper deduction for interest. In all claims the premium notes are to be deducted from the amount of damages.¹ In mutual companies, however, claims founded on policies matured before the receivership are to be preferred to claims on policies not matured, for the maturity of the policy changes the *status* of the policy holder. He stands to the company in the same place that a creditor stands to the firm; he is to be preferred to members of the firm.² The holder of a paid up endowment policy can set off the amount of same though not due against a claim of the insolvent company against him for borrowed money.³

§ 479. **Insolvent Benefit Societies.** — When a corporation, in the nature of a benefit society, ceases to do busi-

¹ *People v. Security Life Ins. Co.*, 78 N. Y. 114. See also *Commonwealth v. American L. Ins. Co.*, 162 Pa. St. 586; 29 Atl. R. 660, for a full discussion of this point.

² *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. Eq. 15; *Stamm v. Northwestern M. Ben. Assn.*, 65 Mich. 317; 32 N. W. Rep. 710. As to other questions see *Bliss v. Parks*, 175 Mass. 539; 56 N. E. R. 566.

³ *Carr v. Hamilton*, 129 U. S. 252; 9 S. C. R. 295; *Association v. Levy*, 38 La. Ann. 1206.

ness because of some impediment, as for example being refused a license by the State in which it was incorporated, it cannot organize a new company and, against the will of the old members, use the endowment fund to obtain reinsurance of the old members, but on application of such old members or parties insured, a court of equity will wind up the affairs of the old company and compel the distribution of such fund among those for whose benefit it was created. In such a case in Michigan,¹ the Supreme Court of the State said: "My opinion is that no assessments could legally be made by the board of trustees for the purpose of paying losses which occurred after license to do business was refused. The inhibition of the statute extended to the exercise of corporate functions in Michigan. Its proceedings as a corporation were all rested, and, as no steps were taken by it to obtain the right to do business any longer, but on the contrary it abandoned the field, the proceedings to close up its affairs should date from that time. The members were entitled to their distributive share of the moneys on hand from that time. If losses occurred prior to that time, the beneficiaries are entitled to precedence and payment of their policies in full from the fund. If members have died since, their representatives are entitled to the distributive shares of such members."² On a bill filed to wind up an insolvent benefit society the holder of a death claim has such an interest in the property that he may file a cross-bill to prevent the misapplication of a trust fund.³ As the obligation to pay assessments to a benefit society is not absolute, but

¹ *Stamm v. N. Western Mut. Ben. Assn.*, 65 Mich. 317; 32 N. W. Rep. 710.

² The court cite as to jurisdiction: *Cramer v. Bird*, L. R. 6 Eq. 143; *In re Suburban Hotel Co.*, L. R. 2 Ch. App. 737; *Marr v. Bank of West Tennessee*, 4 Coldw. 484; *Bradt v. Benedict*, 17 N. Y. 93; *Slee v. Bloom*, 19 Johns. 456. See also *Vanatta v. N. Y. Mut. L. Ins. Co.*, 31 N. J. Eq. 15.

³ *Wilber v. Torgerson*, 24 Ill. App. 119.

rests only upon the will of the member, there generally being no personal promise to pay, when the organization becomes insolvent the collapse is complete. On general principles, all the rules applicable to insolvent corporations apply to benefit societies and regulate proceedings against them.¹

§ 479a. **The Same Subject: Receivers of Benefit Societies.**—The same principles govern in proceedings brought for the appointment of receivers for benefit societies as in the case of other corporations or associations. The subject has already been treated of to some extent.² It has been said,³ that equity will restrain a benevolent association from further transacting its business, where the officers of the association have been guilty of illegal conduct and an injunction is necessary to protect the assets from further illegal management, and will do whatever is necessary to protect the rights of the parties. In another case,⁴ the court held that a complaint, alleging that the association was insolvent; that its assets amounted to \$1,000,000; that its officers had converted \$750,000 to their own use, placing that sum in the bank under the control of the officers without security save the money so deposited; that the money due the corporation from branches in various States was only secured by idemnity of such irresponsible bank, and that the chief officers, who had misappropriated the funds and whose duty it was to call meetings of the board of managers, had failed to do so, and refused to

¹ *Ante*, §§ 57, 58, 59. The subject of what constitutes insolvency is fully discussed in *State v. Bankers Union* (Neb.), 99 N. W. R. 531. See also *Betts v. Conn. Ind. Assn.*, 71 Conn. 751; 41 Atl. R. 65; *Atty.-General v. Bay State Ben. Assn.*, 177 Mass. 274; 54 N. E. R. 551.

² *Ante*, § 59.

³ *Peltz v. Supreme Chamber Order F. U.* (N. J. E.), 19 Atl. R. 668.

⁴ *Supreme Sitting Order of Iron Hall v. Baker*, 134 Ind. 293; 33 N. E. R. 1128.

allow the proceedings to be published as required, and that a large sum would fall due upon certificates within about six months from the filing of the complaint, states ample cause for the appointment of a receiver. In other cases,¹ receivers had been appointed for insolvent societies and the court discussed various questions arising on the claims of certificate holders under the by-laws; but in Pennsylvania, the Supreme Court held² that a receiver should not be appointed for a benevolent society and an injunction issued on allegations that, at an illegal meeting and in the absence of a majority of the members, certain members were illegally expelled and that the new officers, coerced or misled by another defendant, were conducting the order prejudicially to the interests of plaintiff and the order at large, when every substantial averment of the bill is denied by the answer and not overcome by further proof; and the court said that, although the whole scheme of the order might be utterly worthless, impracticable and certain to end in disaster, these facts constituted no ground for appointing a receiver at the instance of a member who was as much in fault as the defendants. And it is no ground for the dissolution of a mutual benefit association that its members, in violation of its by-laws, deposed its president irregularly, and the dissolution of the association was not affected by a vote in favor thereof passed at a special meeting called by the deposed president.³ Within a comparatively recent period receivers have been appointed for a certain class of endowment orders and the courts have

¹ *Chicago Mutual L. Indemnity Assn. v. Hunt*, 127 Ill. 257; 20 N. E. R. 55; *Burdon et al. v. Mass. Safety Fund Assn.*, 147 Mass. 360; 17 N. E. R. 874; *Fawcett v. Supreme Sitting Order Iron Hall*, 64 Conn. 170; 29 Atl. R. 614. See also *Atrup v. Tennessee Mfg. Co. (Tenn.)*, 52 S. W. R. 1693.

² *Crombie v. Order of Solon*, 157 Pa. 588; 27 Atl. 710.

³ *Industrial Trust Co. v. Greene*, 17 R. I. 586; 23 Atl. R. 914.

been called upon to decide as to the rights of the members to the funds accumulated by the society. In one case,¹ it was held that the members were entitled to share in the funds in proportion to the amount paid in by them although the certificates matured in twenty-eight years and bound each member to continue his assessments during that period; and providing that, if the member should comply with all the requirements of the association, he should, at the end of three and one-half years from the date of the certificate, receive a sum not exceeding one-eighth of the sum mentioned therein, and a like sum at the end of each succeeding three and one-half years; and this, although the first period of three and one-half years in the case of some of the certificate holders had elapsed. Generally there can be no recovery for loss after insolvency is decreed,² and death claims have no priority over the other claims, although an assessment has been called to pay such a claim when the latter had not been actually paid before insolvency.³ Where the constitution provided that the assessments should be applied to the creation of two distinct funds, one of which was a death fund and the other a reserve fund, that death claims should be paid from the death fund, and that no death claim should be paid from the reserve fund, except upon a contingency which never happened, and the company was dissolved and a receiver appointed; it was held,⁴ that although the death fund was not sufficient to pay the death claims in full, such claimants

¹ *In re Order Fraternal Guardian* (Appeal of Sheeler), 159 Pa. St. 594; 28 At. R. 482.

² *Reliance Lumber Co. v. Brown*, 4 Ind. App. 92; 30 N. E. R. 625.

³ *Ellerbe v. Farmers', etc., Assn.*, 106 Mo. 13; 16 S. W. R. 683; *Ellerbe v. United Masonic, etc., Assn.*, 114 Mo. 501; 21 S. W. R. 843; *Kentucky, etc., Co. v. Turner*, 93 Ky. 461; 20 S. W. R. 386; *In re Equitable Reserve Fund L. Assn.*, 131 N. Y. 354; 30 N. E. R. 114.

⁴ *In re Equitable Reserve Fund Assn.*, 131 N. Y. 354; 30 N. E. R. 114; affirming 16 N. Y. Supp. 80.

were not entitled to share in the reserve fund; that such reserve fund should be applied, first, to repay the members an assessment called by order of the court, and the balance should be distributed among all the members who had paid all assessments up to the commencement of the suit. The court also held that the time, at which to determine the rights of the members to share in the fund, was the date of the commencement of the suit, and not the date of the dissolution. The rights of the various members upon a dissolution of the association depend somewhat upon the contract into which they entered. As a general rule the fund will be distributed pro rata among those who contributed in proportion to the amounts respectively paid in.¹ Where a general receiver has been appointed for an insolvent benefit association, the court will order the funds held by an auxiliary receiver, appointed for branches within its jurisdiction, to be turned over to the general receiver, and that, too, although the rules of the society provided for the control of the reserve fund by such local branches.² Where the officers and directors of a mutual assessment

¹ In *re Equitable Reserve Fund Assn.*, 131 N. Y. 354; 30 N. E. R. 114; *Fogg v. Sup. L. Order of Golden Lion*, 156 Mass. 431; 33 N. E. R. 692; *Burdon v. Mass., etc., Assn.*, 147 Mass. 360; *Wardle v. Townsend*, 75 Mich. 385; 42 N. W. R. 950; In *re Fraternal Guardians*, 159 Pa. St. 594; 28 Atl. R. 482; *Williams v. United R. F. Assn.*, 166 Mass. 450; 44 N. E. 342; In *re Order Fraternal Guardians*, 159 Pa. St. 594; 28 Atl. R. 482; *Boston, etc., R. Co. v. Mercantile, etc., Co.*, 82 Md. 535; 34 Atl. R. 778; 38 L. R. A. 97 and note; In *re Wisconsin, etc., Co.*, 101 Wis. 1; 76 N. W. R. 775; 42 L. R. A. 300 and note.

² *Farley v. Talbee*, 55 Fed. R. 892; *Ware v. Supreme Sitting Order of Iron Hall* (N. J. E.), 28 A. L. R. 1041. But see to the contrary *Lindquist v. Guines*, 3 Misc. R. 514; 23 N. Y. Supp. 272; *Fawcett v. Supreme Sitting, etc., Coun.*, 29 Atl. R. 614. And in *Wiener v. Sturgiss*, 79 Md. 271; 29 Atl. 613, it was held that the receivers appointed for the general body in the State must show that the property belonged to the main body, and not to the local branch, in an application to have the property in the hands of a receiver for such local branch turned over to them.

association, which was engaged in issuing wagering policies, appropriated to their own use the funds collected from assessments and dues instead of applying them to the payment of death losses, it was held that the receiver could recover such assessments so appropriated from the officers and directors jointly.¹ And the directors of an unincorporated association are personally liable for any deficiency that occurs because of their conversion of funds applicable, according to the by-laws, for the payment of a certain death loss, if they divert the same to the payment of other claims.²

§ 480. **On Dissolution of Mutual Insurance Company Surplus Assets after Creditors are Paid Vests in State.** — When a dissolution of a mutual insurance company has been decreed by a court of competent jurisdiction, its assets remaining after paying all liabilities against the company vest in the State, as such corporation has no stockholders, and its original corporators cannot be regarded as such.³ It is questionable whether this is right on principle; it is certainly reasonable to say that the persons contributing the funds, or who at the time of dissolution were policy holders, and therefore stockholders, are entitled to the surplus remaining after debts are paid.⁴ Under the English Literary and Scientific Institution Act on the dissolution of a literary society its property will be given to some kindred institution as prescribed by the act.⁵

¹ Appeal of McCarty, 110 Pa. St. 379; 4 Atl. R. 925.

² Hammerstein v. Parsons, 38 Mo. App. 332. As to other questions see Commonwealth v. Order Solon, 193 Pa. St. 240; 44 Atl. R. 327; Garham v. Mut. Aid Soc., 161 Mass. 357; 37 N. E. R. 447; Sherman v. Harbin (Ia.), 100 N. W. R. 622; State Investment Co. v. Superior Court, 101 Cal. 135; 35 Pac. R. 549.

³ Titcomb v. Kennebunk M. F. Ins. Co., 79 Md. 315; 9 Atl. Rep. 732; 4 N. Eng. Rep. 411.

⁴ Carlton v. Southern Mut. Ins. Co., 72 Ga. 371

⁵ In re Bristol Athenaeum, L. R. 43 Ch. D. 236.

CHAPTER XV.

ACCIDENT INSURANCE.

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§ 481. **Accident Insurance Governed by the Same General Principles as Other Insurance.** — Within comparatively a few years the business of insuring against loss of time, or life, or against injuries to the person, because of accident, has assumed extensive proportions and, as a consequence, numerous cases have been decided by the courts involving a construction of the contracts made by these accident insurance companies. Accident insurance is simply one form of insurance and the contract should be construed in the same manner as other insurance contracts and be governed by the same general principles. So far, therefore, as the general principles discussed in the preceding pages relating to application, representation, consummation of contract, premium, waiver, estoppel, etc., are applicable, they are to be applied to accident insurance, as well as life insurance contracts.¹

§ 482. **Definition of Accident.** — The Century Dictionary defines an accident to be “an event happening without a concurrence of the will of the person by whose agency it was caused. It differs from mistake in that the latter always supposes the operation of the will of the agent in producing the event although that will is caused by erroneous impressions on the mind.” The same authority also defines an accident to be, in a loose sense, “any event that takes place without one’s foresight or expectation.” The Standard Dictionary gives as a definition “anything occurring unexpectedly or without known or assignable cause. An accident is that which happens without one’s direct intention.” The other standard dictionaries give practically the same definition. The language used in most accident insurance contracts renders it necessary to modify somewhat this definition, for

¹ As to ouster of voluntary association of individuals doing an accident insurance business: *State v. Ackerman* (Guaranty and Accident, Lloyd’s), 51 Ohio St. 163; 37 N. E. R. 828.

the effort is made, by the wording of the policy, to limit the term accident and qualify the casualty insured against. The words most commonly employed in the policies confine the insurance to injuries received by "external, violent and accidental means" with the further provision that the insurance shall not extend "to any bodily injury of which there shall be no external and visible signs upon the body of the insured." In the course of the discussion as to the construction to be placed upon these words we must necessarily examine further into the meaning of the word "accident" as defined by the courts.

§ 483. **External, Violent and Accidental Means: Accident or Disease.**—The Supreme Court of the United States,¹ held that, where the insured attempted to jump off a platform, and alighted heavily on his feet and thereby sustained stricture of the duodenum, which caused death, the death was caused by external, violent and accidental means. It says: "It was further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he

¹ *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100; 9 S. C. R. 755; affirming 23 Fed. Rep. 712. See also *Railway Officials, etc., Co. v. Drummond*, 56 Neb. 235; 76 N. W. R. 562.

alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things or not as expected;' that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. The jury were further told, no exception being taken, that in considering the case, they ought not to adopt theories without proof, or substitute bare possibility for positive evidence of facts testified to by credible witnesses; that where the weight of credible testimony proved the existence of a fact, it should be accepted as a fact in the case; but that where, if at all, proof was wanting, and the deficiency remained throughout the case, the allegation of fact should not be deemed established." The Supreme Court of Pennsylvania has held,¹ that an accidental strain resulting in death was an accidental injury within the meaning of the policy and that it included death from any unexpected event happening by chance and not accruing according to the usual course of things, as a strain received while loading hay. So, where the insured lifted a heavy burden in the course of his business and injured his spine, the injury was held to be one occurring within the meaning of the policy.² So also where the insured was driving and his horse became frightened and ran away, but was at length brought under control, but the insured was apparently seriously injured at the time and either from fright or strain, because of his physical exercise in restraining his horse, died

¹ *North America Insurance Co. v. Burroughs*, 69 Pa. St. 43. See also *Collins v. Fidelity, etc., Co.*, 63 Mo. App. 253.

² *Martin v. Travelers' Ins. Co.*, 1 Fost. & F. 505.

within an hour afterwards.¹ So with a rupture received while exercising with Indian clubs by reason of some unusual exercise or some unforeseen, accidental and involuntary movement of the body; but if the injury had been caused by the ordinary use in the usual way it would not have been an accident.² So where injury was received by insured while attempting to remove his nightshirt.³ So where a death was caused by falling against an engine on a moving train, received by a person, while trying suddenly to stop his speed in running rapidly to get the mail from the train, it is caused by accident.⁴ A blow caused by a falling sleeping car berth resulting in death is an accident.⁵ So where a bridge builder was raising the bents of a bridge and an unexpected weight was thrown on the pike poles in the hands of the men, so that the insured was either struck by the end of the pole in his hand or subjected to a strain so great that he was disabled and subsequently died, it was held that there was sufficient evidence to go to the jury on the question whether the death resulted solely from the accident.⁶ An injury to the knee received while stooping to pick up something is caused by "external" means.⁷ And injuries caused by lifting.⁸

¹ *McGlinchy v. Fidelity & Casualty Co.*, 80 Me. 251; 14 Atl. 13.

² *McCarthy v. Travelers' Ins. Co.*, 8 Biss. 362. In *Feder v. Iowa State, etc., Assn.*, 107 Ia. 538; 43 L. R. A. 693; 78 N. W. R. 252, and *Niskern v. United Brotherhood, etc.*, 87 N. Y. Supp. 640, the injuries were held not accidental.

³ *Smouse v. Iowa State, etc., Assn.*, 118 Ia. 436; 92 N. W. R. 53.

⁴ *Equitable Acc. Ins. Co. v. Osborne*, 90 Ala. 201; 9 South. R. 869. See also *Payne v. Fraternal Acc. Assn.*, 119 Ia. 342; 93 N. W. R. 361; *Carr v. Pacific M. L. Ins. Co.*, 100 Mo. App. 602; 75 S. W. R. 180.

⁵ *Union Casualty Co. v. Mundy (Colo. App.)*, 71 Pac. R. 677.

⁶ *Reynolds v. Eq. Acc. Assn.*, 49 Hun, 605; 59 Hun, 13; 1 N. Y. Supp. 738.

⁷ *Hermlyn v. Crown Accidental Ins. Co. (C. A.)*, 68 L. T. 701.

⁸ *Atlanta Acc. Assn. v. Alexander*, 104 Ga. 709; 30 S. E. R. 939; 42 L. R. A. 188; *Standard L. & A. I. Co. v. Schmaltz*, 66 Ark. 588; 53 S. W. R. 49; *Horsfall v. Pacific M. L. Ins. Co.*, 32 Wash. 132; 72 Pac. R. 1028;

So where the insured choked to death while attempting to swallow a piece of beef steak which accidentally lodged in his windpipe, the death was occasioned from accidental, violent and external means within the meaning of the policy.¹ The court in this case says: "This appellant is an accident insurance company and its policies are termed 'accident policies,' and the very object of insuring in such companies is to obtain indemnity where injury or death results from accident; and while the policy provides that the liability arises when the injury is through external, violent and accidental means, independently of all other causes,' it was not designed that there should be such an external violence as a fall, a kick or a blow, on the person as would cause death or an injury, before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury, where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes and that were liable to occur at any time from natural causes. If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion, or to completely stay the operation of nature in such a manner as to produce disease no one would contend that the pain or the disease was the result of accident or that the terms of this policy

Travelers' Ins. Co. v. Duvall (Ky.), 74 S. W. R. 740; 25 Ky. L. R. 137; *Summers v. Fidelity Cas. Co.*, 84 Mo. App. 605.

¹ *American Acc. Co. v. Reigart*, 92 Ky. 142; 21 L. R. A. 651; 17 S. W. R. 280. To the same effect is *Miller v. Fidelity, etc., Cas. Co.*, 97 Fed. R. 836. But swallowing bad oysters thinking them good is not an accident. *Maryland Casualty Co. v. Hudgins* (Tex.), 76 S. W. R. 745; reversing 72 S. W. R. 1047.

embraced such a case; but when the substance causing the death is visible and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine. There is no external force or violence from the poison and the injury is internal in its character, and yet the authorities hold that the insurance company is liable in such case.¹ It is plain, we think, that the means or that which caused the injury should be external, and not that the injury should have been external. It is said, however, that if the injury is not to be external, the death must have resulted from 'violent and accidental means.' It is universally understood when it is said that one died a violent death, that it was unnatural — a death not occurring in the ordinary way; and in fact the definition of the word 'violent' is 'unnatural' and in using this word the insurance company was attempting to prevent the assured from asserting a claim. In the case of *Paul v. Insurance Co.*,² on a similar policy it was held 'that a death unnatural, the result of accident, imports an external and violent agency as the cause.' This same view was taken by the Illinois Supreme Court in the case of *Healey v. Association*, already cited. A similar construction to the verbiage of like policies has been heretofore given by courts of last resort and if companies, organized as this is, intended that actual external force causing the accident must be shown before a recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning." So where the deceased while asleep fell from a window, it was held that the company was liable.³ And also where the testimony of physicians was that the assured

¹ *Healey v. Association*, 133 Ill. 556; 25 N. E. R. 52; 9 L. R. A. 371.

² 112 N. Y. 472; 20 N. E. R. 347.

³ *Travelers Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. R. 553.

bore on his back marks of extreme violence, apparently recently inflicted, and that his injuries produced his death, it is *prima facie* evidence that the death resulted from bodily injuries through external, violent and accidental means.¹ Where the insured went out on the platform of a car to vomit and fell off and was killed the death was due to accident and not disease.² Disease, as used in an accident policy, means an ailment or disorder of a somewhat settled character, and not a mere temporary disorder arising from some sudden or unexpected derangement of the system.³ It has been held that if death would not have resulted except for the disease the company is not liable.⁴ Where the insured died from the effects of a blow struck by a person after an attempt to blackmail, such death is the result of accidental means.⁵ So where the insured was killed by a man he was ejecting from a hotel office the death was held accidental.⁶ So is hanging by a mob, accident.⁷ And blood poisoning, resulting from a sore toe caused by chafing of a new shoe;⁸ and a wound on the finger resulting in blood poisoning and death;⁹ and a wound received while trimming a corn resulting in blood poisoning,¹⁰ and death caused by the sting of an insect.¹¹ The same was held where the

¹ *Cronkwhite v. Travelers' Ins. Co.*, 75 Wis. 116; 43 N. W. R. 731.

² *Preferred, etc., Co. v. Muir*, 126 Fed. R. 196.

³ *Meyer v. Fidelity & Cas. Co.*, 96 Ia. 378; 65 N. W. R. 328.

⁴ *Commercial, etc., Assn. v. Fulton*, 24 C. C. A. 654; 79 Fed. R. 423; 45 U. S. App. 578.

⁵ *Rickards v. Travelers Ins. Co.*, 89 Cal. 170; 26 Pac. R. 762.

⁶ *Lovelace v. Travelers Protec. Assn.*, 126 Mo. 104; 28 S. W. R. 877; 30 L. R. A. 209. But see *Hester v. Fidelity, etc., Co.*, 69 Mo. App. 186.

⁷ *Fidelity & Cas. Co. v. Johnson*, 72 Miss. 333; 17 Sou. R. 2; 30 L. R. A. 206 and note.

⁸ *Western Comm. Travelers Assn. v. Smith*, 29 C. C. A. 223; 85 Fed. R. 401; 40 L. R. A. 653.

⁹ *Delaney v. Modern Acc. Club. (Ia.)*, 97 N. W. R. 91.

¹⁰ *Nax v. Travelers Ins. Co.*, 130 Fed. R. 985.

¹¹ *Omberg v. U. S. Mut. Acc. Assn.*, 101 Ky. 303; 40 S. W. R. 909.

insured was found in the back room of a house shot through the heart. He had been dead about half an hour and there were no powder marks on his flesh or clothing; in another room connected by a door with the one where the body of deceased was discovered, was found the body of a woman mortally wounded by a pistol shot in the side and whose flesh and clothing were powder burned, near her was a pistol but it was not shown whether it was loaded or not. The woman had been mistress of the insured and there was some evidence of a quarrel. It was held that, under a policy stipulating, that it only covered injuries effected by external, violent and accidental means, an injury not anticipated or naturally to be expected by the insured is accidental means within the meaning of the contract, where it does not in terms provide against the recovery if the death was caused by injury intentionally inflicted by the assured or any other person.¹ The Supreme Court of the United States has held that, although a policy of insurance against bodily injuries effected through external, violent or accidental means, provides that it shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities, or disease, or by suicide, or self-inflicted injuries, it covers a death of the insured by hanging himself while insane.² And it was held, that where death resulted from the accidental drinking of poison it was caused by external, violent and accidental means.³ If the proof clearly shows that, though the insured met with an accident, both it and the death were due to disease, there can be no recovery.⁴

¹ Accident Ins. Co. v. Bennett, 90 Tenn. 256; 16 S. W. R. 723.

² Accident Ins. Co. v. Crandal, 120 U. S. 527; 7 S. C. R. 685. See *post*, § 496, Suicide.

³ Healy v. Mut. Acc. Assn., 133 Ill. 556; 25 N. E. R. 52; 9 L. R. A. 371; reversing 35 Ill. App. 17.

⁴ Sharpe v. Commercial Travelers, etc., Assn., 139 Ind. 92; 37 N. E. R. 353. See also Commercial Travelers, etc., Assn. v. Fulton, 24 C. C.

§ 484. **Same Subject: Drowning.**—In a recent case,¹ the court reviewed the law applying where death occurs from drowning as follows: “It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means.² We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause. In *Winspear v. Insurance Co.*,³ the terms of the policy provided ‘that it should cover any personal injury caused by accidental, external, and visible means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease.’ The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply. In *Lawrence v. Insurance Co.*,⁴ the policy provided: ‘This policy covers

A. 654; 79 Fed. R. 423; 45 U. S. App. 578. As to puncture of hypodermic syringe *Benley v. Interstate Cas. Co.*, 158 N. Y. 723; 53 N. E. R. 1123; affg. 8 App. Div. 127; 40 N. Y. Supp. 513.

¹ *Manufacturers Acc. Indemnity Co. v. Dorgan*, 7 C. C. A. 581; 58 Fed. R. 945. See also *U. S. Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516; 47 N. E. R. 544; 40 L. R. A. 453; *DeNan v. Commercial Travelers, etc.*, 157 N. Y. 690; 51 N. E. R. 1090.

² *Trew v. Assurance Co.*, 6 Hurl. & N. 838; *Winspear v. Insurance Co.*, 6 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

³ 6 Q. B. Div. 42.

⁴ 7 Q. B. Div. 216.

injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, * * * or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury.' The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the railway, when an engine and carriages which were passing went over his body, and killed him. It was held that 'the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable. Mr. Justice Watkin Williams said in this case: 'The true meaning of this proviso is that, if the death arose from a fit the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation.' After giving some illustrations, the learned justice continued: 'I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.' These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the Supreme Court in

case of *Insurance Co. v. Crandal*.¹ They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death. We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease.' In our opinion the adjective 'accidental' qualifies not only 'injuries,' but also 'death,' and therefore an accidental death by drowning does result from, and is caused indirectly by fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The exception is broader than the exceptions in the policies considered in the *Winspear* and the *Lawrence* cases, and is made so by the use of the word 'indirectly.' As can be seen from the words of Mr. Justice Williams quoted above in the *Lawrence* case, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable. We are therefore finally brought to the question what the words 'disease and bodily infirmity' include. We think the charge of the court below upon this point must be sustained. In a broad, generic sense, any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or a lack of proper food for a number of hours, or from any other

¹ 120 U. S. 527-532; 7 Sup. Ct. R. 685.

cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the words ‘disease and bodily infirmity,’ as used in this policy.” Where the assured was found drowned but there was nothing to show how he had fallen into the water, the company was held liable, the court saying that where a person, not likely to commit suicide, is found drowned it is *prima facie* evidence of accidental death.¹ Where the occupation of the insured was that of a farmer and he was drowned by the capsizing of a boat while rescuing the crew of a wrecked ship and the body was recovered with a bruise over the left temple, but no positive proof was offered as to the cause of the injury other than the circumstances given, it was held that the death was covered by the policy.²

§ 485. **Same Subject: Hernia** — Although the policy excepts death from “hernia,” the company is not relieved where death resulted from hernia caused by external, violent and accidental means.³ In the case cited it was held that, where a person injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation, performed when death was inevitable without it, the accident is the proximate cause of his death. The court says: “It is ably urged in argument that deceased died of hernia, a cause of death excepted by the policy. Although appellant in its third special defense, which is verified, averred that the cause of said death was medical and surgical treatment and no other cause, which seems to be greatly at

¹ *McDonald v. The Refuge Ass. Co.* (Ct. of Sessions), 27 *Scottish Law Reporter*, 764. See also *Leman v. Manhattan L. Ins. Co.*, 46 *La. Ann.* 1189; 15 *South R.* 388.

² *Tucker v. Mut. Ben. L. Co.*, 50 *Hun*, 50; 4 *N. Y. Supp.* 505

³ *Travelers Ins. Co. v. Murray*, 16 *Col.* 296; 26 *Pac. R.* 774; *Atlanta Acc. Assn. v. Alexander*, 104 *Ga.* 709; 30 *S. E. R.* 939; 42 *L. R. A.* 188; *Summers v. Fidelity, etc., Co.*, 84 *Mo. App.* 605.

variance with the theory of the argument, counsel perhaps was not precluded by it. We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia must be regarded as the result of the accident that caused the death; the cause of death; the force of the blow received; the consequent injury arising from the concussion, and the hernia as resulting. Deceased was insured against the accident by the terms of the body of the policy. Had he died of ordinary hernia not produced by a serious and violent injury, appellant would probably have been released from payment; but, when the hernia is the accidental result of the force of the blow, it cannot be regarded as excepted. In this view, both the contract of insurance and the exception can be allowed to stand without doing violence to either,—a rule always adopted when practicable. If not so construed the exception must yield in this instance.” And where the deceased met with a violent fall, by which he immediately became ruptured in the bowels and afflicted with strangulated hernia for which a surgical operation was necessary, and in consequence of which and the hernia he died, it was held that the company was liable.¹

§ 486. External, Violent and Accidental Means — Examples of More Strict Construction.—An opinion frequently cited is that given by Judge Shipman of the District Court of the United States sitting as arbitrator.² In that case the person jumped from the cars while in motion and ran quite a distance to accomplish certain business, without any necessity therefor, and, without any unforeseen or involuntary movement of the body, such as

¹ *Fitton v. Accidental Death Ins. Co.*, 22 L. T. 861.

² *Southard v. Ry. Pass. Assn. Co.*, 34 Conn. 574. Another case where a sudden and unexplained loss of sight was held not to be accidental, *Cobb v. Preferred M. Acc. Assn.*, 96 Ga. 818; 22 S. E. R. 976.

stumbling, or slipping, or falling, found that a rupture had been sustained. In holding that this injury was not caused by external, violent and accidental means, the court said: "The contract, as I have already intimated, in its broadest scope only embraces within its indemnity personal injuries effected through forcible and accidental means; and the proviso simply excludes from this class of injuries all that occur under the circumstances enumerated. All others of this class are included. The degree of violence or force is not material and had the insured in this case in jumping from the car lost his balance and fell, or struck upon some unseen object and wounded himself, or in running had stumbled or slipped on the ice, his injury might be attributed to accidental as well as violent means, and assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But, as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the car with his eyes open for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground just as he intended to do. So in running he ran from no peril or necessity but for own convenience, voluntarily, and, from all that appears, without stumbling, slipping or falling. In both cases he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control. All that he claims is that, some hours after, it was discovered a muscle in the wall of the abdomen had given way under the strain to which he had voluntarily put it, under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping or running, or both, does not help the matter, unless we call running and jumping accidents. I therefore am of the opinion

that the alleged injury did not result from an accident, within the meaning of the contract." It was also held by the Court of Appeals in New York that death resulting from a malignant pustule, caused by the contact with the body of putrid animal matter containing poisonous bacillus anthrax, is death from disease and not from accidental means.¹ In this case the court says: "The insurance in this case was against bodily injuries, effected through external, violent and accidental means. It was not to extend 'to any death or disability which may have been caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date of the policy, 'nor to any case except where the injury is the proximate or sole cause of the disability or death.' There cannot be the slightest doubt that malignant pustule is regarded generally by those who have but the usual acquaintance with such matters, as a disease. Every particle of testimony given by the doctors called by the plaintiff shows clearly to my mind that it is so regarded generally in the medical world and that it is only when these doctors are asked to define the case in a manner to suit their refined notions of scientific and artistic accuracy that they define the trouble as a 'pathological' condition of the body, in the one case 'succumbing to infliction of this particular poison' and in the other 'following this particular inroad of this particular kind of bacilli.' The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, small-pox, scarlet fever and such like diseases, is that this particular condition is caused by different bacilli from the others and they come in contact with the skin or enter its pores, while in the other cases they are generally breathed in. But no abrasion of the skin is needed to pro-

¹ Bacon v. United States Mut. Assn., 123 N. Y. 304; 25 N. E. R. 399; 9 L. R. A. 617; reversing 3 N. Y. Supp. 237.

duce the contact of the bacilli and what follows from such contact seems to be as plainly a disease as in the case of small-pox or typhoid fever. The question then is, even assuming that some particular physicians refuse to call this a disease and describe it as a 'pathological condition' whether it is a disease within the meaning of that term as used in this policy. Taking all the facts testified by these physicians of the plaintiff, including their own special description of this condition of the body, and it seems to me there can be no intelligent rational doubt that the insured died from a disease attacking him subsequent to the issuing of the policy. The definition given by the physicians for the plaintiff as to the difficulty being a pathological condition of the body and not a disease, is, upon these facts, entirely too fragile to base a recovery upon; and the distinction between a disease and a pathological condition of the body is, with reference to this case, much too refined for common acceptance. It seems to me clear that the meaning of the words used in the policy cover just such a case, and that the parties never intended that a cause of death, which to all outward appearances and to the world in general was a disease, should be converted into a 'pathological condition' of the body, caused by an accident." It is not death by accident where the assured was killed in a quarrel which he had provoked and in which he was the aggressor and had warned his adversary to "put himself in shape." ¹

§ 487. **Same Subject: Sunstroke.**—Sunstroke has been held to be a disease when contracted in the course of ordinary duty; this was settled in England by the opinion of

¹ *Taliaferro v. Travelers Prot. Assn.*, 25 C. C. A. 494; 80 Fed. R. 368; 49 U. S. App. 275. But see *Union Cas. Co. v. Harroll*, 98 Tenn. 591; 40 S. W. R. 1080

Chief Justice Cockburn.¹ The learned chief justice says: “In the present instance, the disease called ‘sunstroke’ although the name would at first seem to imply something of external violence is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun’s rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected, and so died.” This case was cited and approved in that of *Dozier v. Fidelity & Casualty Co.*² It has also been held by the Court of Appeals of New York that sunstroke is a disease.³

§ 488. **External and Visible Signs.** — Accident policies in general use nearly always provide that the benefit shall not extend to any bodily injury “of which there shall be no external and visible signs upon the body” of the insured. Whether there are such signs is a question of fact. In one case,⁴ the evidence showed that the body of the insured, when found, had bloody froth at the mouth and spots of blood upon the face and chest and red spots on the body, it was held that whether this constituted evidence of external signs of injury, was a question of fact to be determined by the jury. A discoloration of the shoulder is an external and visible sign;⁵ so is pallor and grayish look about the

¹ *Sinclair v. Maritime Pass. Assurance Co.*, 3 El. & Bl. 478; 7 Jur. (N. S.) 369.

² 46 Fed. R. 446; 9 L. R. A. 114.

³ *Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 236; affirming 6 T. & C. 364. See also *Railway Officials, etc., Assn. v. Johnson*, 109 Ky. 261; 58 S. W. R. 694; 52 L. R. A. 401.

⁴ *United States Acc. Co. v. Newman*, 84 Va. 52; 3 S. C. R. 805.

⁵ *Thayer v. Standard L. & A. Ins. Co.*, 68 N. H. 577; 41 Atl. R. 182.

face.¹ It has also been held,² that the injury contemplated need not be visible to the eye but the policy extends to a strain of the recti muscles which could be ascertained by a physician by the sense of feeling, by applying the hands upon the exterior of the body. Where death resulted from peritonitis, occasioned by a fall, the insurer is liable although the insured previously had the disease and had thus been rendered peculiarly liable to a recurrence of it.³ Where the injury was a strain and was not externally visible until some time after the accident, it was held that the insured was entitled to recover, notwithstanding the provision that the policy should not cover injuries of which there was no visible external marks on the body.⁴ The court said: "It is conceded that there is no evidence that there was any visible mark upon the body of the plaintiff at the very time of the injury. It was a strain, and the immediate effects of the injury would not probably be apparent or visible immediately. The court instructed the jury that it would be sufficient for the plaintiff to show that the injury was visible soon after the accident and as a consequence of the injury. It is contended that this is an erroneous construction of the contract of insurance, and that there was in fact no evidence that there was any visible mark indicating an injury at any time. We think there was evidence from which the jury could fairly find that the effects of the strain were visible within a few days after the accident. There is nothing in the clause of the contract above set out which requires that the effects of the accident shall be

¹ *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132; 72 Pac. R. 1028; *Root v. London, etc., Co.*, 86 N. Y. Supp. 1053.

² *Gale v. Mut. Aid, etc., Assn.*, 66 Hun, 600; 23 N. Y. Supp. 893.

³ *Freeman v. Mercantile Mut. Ben. Assn.*, 156 Mass. 351; 30 N. E. R. 1013.

⁴ *Pennington v. Pac. Mut. L. Ins. Co.*, 85 Ia. 468; 52 N. W. R. 482

visible immediately. Such a construction of the contract would defeat all claims for internal injuries not apparent to the eye at once, and would render such a policy in many cases the means of defeating just claims for indemnity. The contract does not contemplate that there must be bruises, contusions, or lacerations on the body, or broken limbs." In another case the insured was chopping fire wood in the woods several miles from his residence; the place where he was at work was slippery because of the sleet and hail that had fallen, and the testimony of the companion with him was that he (assured) split a piece of cord-wood and, while he was splitting the wood and throwing it on one side, he was heard by his companion, who stood near him, to fall, and was found lying across the log in an unconscious condition and died within a minute afterwards; the jury found for the plaintiff and the court refused to set aside the verdict.¹ Where, however, the policy insures against death from "bodily injuries caused by violent, accidental, external and visible means," the evidence showed that the insured had just arisen from his bed and was in the act of pulling on his stocking when he "felt something give way on his inside," and shortly afterward died. Examination of the body showed that some of the interior organs had become displaced, pressing upward on the heart to such an extent that its action was stopped, it was held that the death was not within the limitations of the policy.² The deceased, in another case, who was subject to epileptic fits, was found dead in a plunge bath in an almost standing position, the water being a temperature of about 100 degrees, and the only external signs of injury were an abrasion between the eyes and a bruise on one side of the head. His physician testified that the entry into

¹ *Eggenberger v. Guarantee Mut. Acc. Assn.*, 41 Fed. R. 172.

² *Clidero v. Scottish Acc. Ins. Co.* (Scot. Ct. Sess.), 29 Scot. Law Reporter, 303.

the bath of one in his condition would be likely to result in an epileptic attack, but that the fall or blow which caused the abrasion or bruise were not sufficient to have caused death. The court held that the company was not liable, both because there were no external and visible signs of injury, and also because death resulted from causes other than external, violent and accidental means. The clause which provides that the insurance shall not extend to any bodily injuries of which there shall be no external and visible signs upon the body of the insured, does not apply to fatal injuries, but only to those not resulting in death when a clause preceding reads, "nor to any death caused," etc.¹ In that case the court said: "It would be utterly unjust if this condition applied in case of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion, — means of death leaving no outward mark, — and also where the insured has been killed and his body is missing. The context shows that the clause is only applicable to injuries not resulting in death. The policy declares that the insurance shall not extend to bodily injuries unless the external sign of injury is visible, nor to any death caused in certain ways named. There are reasons for the condition applying to surviving claimant, — he has unusual chance for feigning an internal injury if disposed to defraud the insurers, — but no such protection is required when the accident caused death. The dead body is external and visible sign enough that an injury was received." ²

§ 489. **Same subject: Gas.** — Some policies provide that the company shall not be liable for any death or

¹ *McGlinchy v. Fidelity, etc., Co.*, 80 Me. 251; 14 Atl. 13.

² See also *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 20 N. E. R. 347; *Bernays v. U. S. Mut. Assn.*, 41 Fed. R. 455; *Eggenberger v. Guarantee Mut. Acc. Assn.*, 41 Fed. R. 172; *Mallory v. Ins. Co.*, 47 N. Y. 52.

disability caused by "inhaling of gas." It has been held that this exception does not apply to accidental death caused by breathing while asleep the atmosphere of a room filled with illuminating gas.¹ In this case the Court of Appeals of New York said: "In expressing its intention not to be liable for death from inhaling gas, the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context these words must be interpreted as having reference to medical or surgical treatment in which *ex vi termini* would be included the dentist's work; or to a suicidal purpose. Of course the deceased must have, in a certain sense, inhaled gas; but in view of the finding that the death was caused by accidental means, the proper meaning of words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. The finding itself defines the cause of death as the breathing of the atmosphere of the room full of illuminating gas. To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake or poisonous substance may be inadvertently touched but whatever the motive of the insured, his act precedes either fact. I agree with the counsel of the respondent in his suggestion that if the exception is to cover all cases where death is caused by the presence of gas there would be no reason for using the word 'inhale.' If the policy had said that it was not to

¹ Paul v. Travelers' Ins. Co., 112 N. Y. 472; 20 N. E. R. 347; 3 L. R. A. 443; affirming 45 Hun, 313. To the same effect is Fidelity & Cas. Co. v. Lowenstein, 38 C. C. A. 29; 97 Fed. R. 17; 46 L. R. A. 450; and Fidelity & Cas. Co. v. Waterman, 161 Ill. 632; 44 N. E. R. 283; 32 L. R. A. 654. See also *post*, § 493.

extend to any death caused wholly or in part by gas it would have expressed precisely what the appellant now says is meant by the present phrase and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved.¹ In their construction their words should be taken in that sense to which the apparent object and intention of the parties limit them and which is to be gathered from the surrounding clauses, and from all the parts of the instrument.² It is an accepted canon of interpretation that if there is any uncertainty as to whether given words are used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee.³ To hold that the death of plaintiff's intestate was caused by the inhaling of gas, within the meaning of this policy, would be to construe its terms contrary to the usual import of language, and in fact to hold against the finding that the death was accidental. As to the point raised by the appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief, sufficiently establish that as a proposition.⁴

¹ *Ca'lin v. Insurance Co.*, 1 Sum. 440.

² *Yeaton v. Fry*, 5 Cranch, 335; *White v. Insurance Co.*, 15 How Pr. 288; *Hoffman v. Insurance Co.*, 32 N. Y. 405.

³ *Doe v. Dixon*, 9 East, 15; *Marvin v. Stone*, 2 Cow. 806.

⁴ *Trew v. Railway Co.*, 7 Jur. (N. s.) 878; *Reynolds v. Insurance Co.*, 22 Law T. (N. s.) 820; *McGlinchy v. Casualty Co.*, 80 Me. 251; 14 Atl. Rep. 13.

The case of *Hill v. Insurance Co.*,¹ cited by appellant, was that of a physician's death from drinking by mistake water from a goblet in which was some poison. It was held by a divided court, that the injury was not effected through external and violent means within the meaning of a similar provision of a policy. We cannot approve of the reasoning of the court and agree with the general term opinion in this case, that the rule there laid down was too strict. So where the deceased descended into a dug out portion of a drive well to repair a pump and his death was caused by asphyxia, it was held that the company was liable.² In that case the court said: "According to the undisputed facts above referred to the death of the insured was caused by external, violent and accidental means, and without any conscious or voluntary act on his part. No one knowing as he did, the shallowness of the dug out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony, above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the post-mortem examination." It has also been held³ that it was not an error to refuse to instruct the jury that inhaling coal gas was a taking of poison if they believed coal gas to be a poisonous substance which when inhaled destroyed

¹ 22 Hun, 187.

² *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79; 22 Atl. R. 871; 13 L. R. A. 661.

³ *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; 3 S. E. R. 805.

life. And where the language of the policy was that the company should not be liable for death or disability "arising from anything accidentally taken, administered or inhaled, contact of poisonous substances, inhaling gas or any surgical operation," the company was held liable where death occurred by inhaling illuminating gas which accidentally escaped in a hotel room where the insured was sleeping.¹ And where the policy exempted the company from liability in case of death caused by inhaling gas, it was held that recovery cannot be had in case of death caused by inhalation of illuminating gas where it is uncertain whether the death was the result of an accident or suicide.² In this case Judge Blodgett refers to the case of *Paul v. Travelers Ins. Co.*,³ and says: "The reason by which that court reached its conclusion is not satisfactory to my mind. The language of the policy is so clear as to require no construction. The words are unequivocal that the defendant does not insure against death caused by inhaling gas. There is nothing in the terms of the policy intimating or suggesting that the inhalation of gas must be voluntary or involuntary in order to exempt defendant from liability. That the defendant had a right to so limit its liability there can be no doubt. All the plaintiff's rights in this action arise under the policy. It constitutes the only relation between the parties. If the policy does not, by the fair and natural import of its words, give a right of action under the facts, then the plaintiff has no right of action. It seems to me, and that too with-

¹ *Menneiley v. Employers Liability Assn. Co.*, 148 N. Y. 596; 43 N. E. R. 54; 31 L. R. A. 686, reversing 72 Hun, 477; 25 N. Y. Supp. 230. See also *Travelers Ins. Co. v. Dunlap*, 160 Ill. 642; 43 N. E. R. 765; *Metropolitan Acc. Assn. v. Froiland*, 161 Ill. 30; 43 N. E. R. 766; affg. 59 Ill. App. 522.

² *Richardson v. Travelers Ins. Co.*, 46 Fed. R. 843.

³ 112 N. Y. 472.

out regard to the testimony which defendant has put into the case, that the clause under which defendant claims exemption from liability was expressly adopted because of the impossibility in most cases of death by the inhalation of gas to decide whether the death was occasioned by the inhalation of gas with suicidal intent or whether it occurred accidentally. What I mean is that a suggestion from the attorney of the defendant that this was the reason for inserting this clause in the policy is as persuasive to the mind as the sworn testimony which defendant has offered as to such reason, because it suggests a reasonable explanation why the clause is there. This case can also, as I think, be differentiated from the case cited by plaintiff, in this: that in that case it was found as one of the facts that the death of the insured was occasioned by accidental means. Here the proof will allow no such finding. It leaves the fact wholly unsettled as to whether the death of Mr. Richardson was the result of accident, or whether it was occasioned by his suicidal act and intent." It has also been held that complaint of soreness was not a "visible sign" of injury, although nose-bleeding might be.¹ It appears from these cases that the liability of the company depends upon a construction of the words used in each particular case and even then the courts are not always agreed as to the construction to be placed on them.²

§ 490. **Proximate Cause.** — Accident policies usually contain a stipulation that they shall not apply to any case, "except where the injury is the proximate and sole cause of the disability or death." The question as to the proximate cause also arises in determining whether the death was the

¹ *Whitehouse v. Travelers Ins. Co.*, Fed. Cases No. 17, 566; 7 Ins. L. Jour. 23.

² See also *post*, § 493, Poison.

result of accident or disease, and in deciding what was the proximate cause the courts have been truly refined and subtle in their distinctions. In the cases cited in the preceding sections, bearing upon the question whether the accident was caused by external, violent and accidental means, or by disease, this subject is also discussed and they should be again referred to in this connection.¹ In a recent case in Massachusetts the death resulted from peritonitis, occasioned by a fall, and, in holding that the fall was the proximate cause of the death, the Supreme Court of Massachusetts says:² “Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in dealing with such cases, the maxim, ‘*causa proxima non remota spectatur*,’ is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go further back in the line of causation than to find the active, efficient, producing cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient, predominant cause, which following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. Any injury which might naturally produce death in a person of a certain temperament, or state of health, is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or

¹ See *ante*, § 483, *et seq.*

² *Freeman v. Mercantile Mut. Acc. Assn.*, 156 Mass. 351; 30 N. E. R. 1013; 17 L. R. A. 753. Other cases where the subject is considered are: *National Mass. Acc. Assn. v. Shryock*, 20 C. C. A. 3; 73 Fed. R. 774; 36 U. S. App. 658; *Hubbard v. Mutual Acc. Assn.*, 98 Fed. R. 930; *Martin v. Manufacturers, etc., Co.*, 151 N. Y. 94; 45 N. E. R. 377.

previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes.” In a recent case, decided by the Supreme Court of Judicature in England,¹ the deceased person, while on a railway platform, was suddenly seized with a fit, which caused him to fall forward off the platform across the railway. A locomotive engine was at that moment passing the station, and passed over his neck and body, and he received mortal injuries. Justice Watkin in this case said: “It seems to me that the well-known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable to this case. Lord Bacon’s language in his ‘Maxims of the Law,’² runs thus: ‘It were infinite for the law to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause.’ Therefore, I say, according to the true principle of law, we must look at only the immediate and proximate cause of death; and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that, if the death arose from a fit, then the company are not liable, even though the accidental injury contributed to the death in the sense that they were both causes which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of death, before the company was exonerated, and it is not the less so because you can show that

¹ *Lawrence v. Accidental Ins. Co.*, L. R. 7 Q. B. D. 216.

² Reg. 1.

another cause intervened and assisted in the intervention. Now if the argument of the defendants be a good one, this absurdity would follow. Supposing a man went out in the field following sports, and he were to be seized with a fit, either a fainting fit or an epileptic fit, or any other fit, and had retired to one side of the field, and remained there recovering from the fit, and, being there, a sportsman — not knowing he was there — accidentally shot him; it might be said, in the same manner, that the cause of death arose from a fit. It seems to me only to require to be stated to show the entire absurdity of it. The only difference between that case and this is in the time that intervened between the time of the fit and the person being placed within the influence of the succeeding accident, which, in this case, was very short; but I fail to see in point of reason, that there is any difference between one hour, or one minute, or one day. The break in the chain of causes seems to be equally complete. I, therefore, put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit; and, therefore whether it contributed directly or indirectly, or by any other mode to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.” So where the insured was injured by falling from a veranda and the injury, which at first seemed slight, resulted in erysipelas and the insured died some 23 days afterward, it was held that the injury was the proximate and sole cause of the death.¹ So where the insured received an injury to his thumb and a few days later received another injury to one of his fingers; the first wound had been lanced about ten days after the injury and continued to discharge matter up to

¹ Accident Ins. Co. v. Young (Can. Sup. Ct.), 12 Canadian Law Times, 217.

the time of the second injury so that virus from the first wound might have communicated to the second, causing blood poisoning, it was held that, if the inoculation occurred at the time the first wound was made and was part of the accident, such accident was the sole and proximate cause of the death.¹ In another case the deceased had a fall and complained of its effects for several days, and then fell sick and died, it was a question whether the deceased died of the effects of the wound or from typhoid fever. The evidence being conflicting on that point, the verdict as usual resulted for the plaintiff, and the court refused to disturb it.² And where the insured was accidentally shot through the foot which caused fever and tetanus, during an attack of which and eighteen days after the injury the insured cut his throat, it was held that the wound in the foot was the proximate cause of the death.³ And where the insured fell into a hole while intoxicated from which death resulted it was held that the fall was the proximate cause of the death.⁴ And again where the insured had his arm broken and a few days afterward suffered from serious pains in his chest and lungs, he then became convalescent for a week or ten days, when he was attacked in a manner similar to the first attack and died nineteen days after the injury, it was held that a finding that his death was caused solely by the breaking of the arm was warranted by the evidence.⁵ In *National Benefit Assn. v. Grauman*,⁶ the insured sustained certain bodily injuries which were occasioned by two separate falls. The injuries were

¹ *Martin v. Equitable Acc. Assn.*, 41 N. Y. St. Rep. 77; 16 N. Y. Supp. 279; affirmed 151 N. Y. 94; 45 N. E. R. 377.

² *Standard L., etc., Ins. v. Thomas*, 13 Ky. L. R. 593; 17 S. W. R. 275.

³ *Travelers Ins. Co. v. Melick*, 12 C. C. A. 544; 27 U. S. App. 547; 65 Fed. R. 178; 27 L. R. A. 629.

⁴ *Prader v. National Masonic Acc. Assn.*, 95 Ia. 149; 63 N. W. R. 601.

⁵ *Peck v. Equitable Acc. Assn.*, 52 Hun, 255; 5 N. Y. Supp. 215.

⁶ 107 Ind. 288; 7 N. E. R. 233.

in part external and visible and resulted in apoplexy and death. The court held that the fall and injury were the proximate cause of the death and "that the injury, resulting from the fall, produced a condition, aptly designated by that name, did not render it any less the cause of death."¹ Where the insured, while bathing in the sea, became suddenly insensible and fell on his face in the water and was drowned, it was held that the company was liable.² And in the noted case of *Winspear v. Acc. Ins. Assn.*³ a man while fording a river was seized with a fit, and so fell and was drowned, it was held that the company was liable. So, where one went in to bathe, and dived from a plank into the water six or seven feet deep, and sustained a rupture of the tympanum of the ear, it was held that the accident was the proximate cause of the injury.⁴ So where the horse driven by the insured became alarmed and ran away and the insured died shortly afterward, either from exertion in endeavoring to stop the horse or from fright, it was held that the company was liable.⁵ In another case the question whether insured died from a railway accident or Bright's disease was left to the jury. The court, however, suggested that the test was whether she had apparent good health just before the accident, or did the symptoms come on just afterward.⁶ Where the insured fell and dislocated his shoulder, and after being confined to his room all the time, died a month afterward from pneumonia, the company was held liable. But where⁷

¹ See also the somewhat similar case of *Hall v. American, etc., Assn.*, 86 Wis. 518; 57 N. W. R. 366; and *Aetna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 74; 56 S. W. R. 87.

² *Reynolds v. Acc. Ins. Co.*, 22 L. T. (N. S.) 820.

³ 6 Q. B. D. 42.

⁴ *Rodney v. Travelers Ins. Co.*, 3 N. M. 316; 9 Pac. R. 348.

⁵ *McGlinchy v. Fidelity and Casualty Co.*, 80 Me. 251; 14 Atl. R. 13.

⁶ *Railway v. Acc. Ins. Co.*, cited Bliss on Insurance, section 406.

⁷ *Isitt v. Ry. Pass. Ass. Co.*, 22 Q. B. D. 504.

the insured was engaged in severe labor and was injured by a heavy weight falling on him from which he immediately complained and went home and died two weeks afterward, but there were no external marks of the injury on the body, the company was relieved.¹ In another case,² it was held that the fact that an accidental fall ruptured a kidney because of its cancerous condition, does not prevent such accident being the cause of the ensuing death of the injured person, "independent of all other causes," within the meaning of an accident policy, and in the case of *Western Commercial Travelers, etc., Assn. v. Smith*,³ where blood poisoning and death resulted from an abrasion of the toe caused by the chafing of a tight shoe, the court, in holding the chafing accidental and the proximate cause of the death, said: "If the death was caused by disease, without any bodily injury inflicted by external, violent and accidental means, as in the case of the malignant pustule,⁴ and as in the case of sunstroke,⁵ the association was free from liability by the express terms of the certificate. If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such bodily infirmity that a short run,

¹ *Owen v. Travelers Ins. Co.*, 12 Ins. L. J. 75.

² *Fetter v. Fidelity & Cas. Co.*, 174 Mo. 256; 73 S. W. R. 592; 61 L. R. A. 459.

³ 29 C. C. A. 223; 85 Fed. R. 401; 56 U. S. App. 393; 40 L. R. A. 653.

⁴ *Bacon v. United States Mut. Acci. Asso.*, 123 N. Y. 304; 25 N. E. R. 399; 9 L. R. A. 617.

⁵ *Sinclair v. Maritime Pass. Assur. Co.*, 3 El. & El. 478; *Dozier v. Fidelity & C. Co.*, 46 Fed. Rep. 446; 13 L. R. A. 114.

followed by stooping, which would not have injured a healthy man, produced apoplexy,¹ the association was exempt from liability, because the death was caused partly by disease and partly by accident. If the death was caused by bodily injuries affected by external, violent and accidental means alone, the association was liable to pay the promised indemnity. If the death caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such case, the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans* to the accident alone."² And recovery can be had on an accident policy where an accidental injury caused rheumatism which caused death.³ Where the policy provided that the company would not be liable for death arising from natural disease, although accelerated by accident, the insured was thrown off a car and died within three months, but it was shown that he had for years suffered from kidney disease, but was free from active symptoms of that disease, although it came again five weeks after the accident; it was held that the company

¹ Travelers' Ins. Co. v. Selden, 42 U. S. App. 253; 78 Fed. Rep. 285; 24 C. C. A. 92.

² Travelers' Ins. Co. v. Robbins, 27 U. S. App. 547, 560, 561; 65 Fed. Rep. 178, 186; 12 C. C. A. 544, 552; 27 L. R. A. 629; Union P. R. Co. v. Callaghan, 12 U. S. App. 541, 550; 56 Fed. Rep. 988, 994; 6 C. C. A. 205, 210; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 475; 24 L. ed. 256, 259; National Masonic Acci. Asso. v. Shryock, 36 U. S. App. 658, 663; 73 Fed. Rep. 774, 776; 20 C. C. A. 3, 5.

³ Travelers Ins. Co. v. Hunter, 30 Tex. Civ. A. 489; 70 S. W. R. 798.

was not liable, as death was caused by kidney disease accelerated by the accident.¹ The Supreme Court of the United States, in an often cited case,² held that if the deceased received an internal injury which in direct course produced duodenitis and thereby caused death, the injury was the proximate cause of death. And so where a person was injured by an accident resulting in hernia and died after a dangerous and unsuccessful surgical operation, performed when death seemed inevitable without it, the accident was the proximate cause of the death.³

§ 491. **More Hazardous Occupation.** — “It is competent,” says the Supreme Court of Indiana,⁴ “for the parties to provide in the policy of insurance that a forbidden hazard shall make the policy void, or that the amount of the insurance in case of increased hazard, shall be diminished in proportion; and, in case the policy itself does not name the forbidden or increased hazard, it will be for the jury to determine whether such change in the risk has taken place and in what degree the risk has been increased.” Thus, where the by-law of the association provided that, “any member receiving an injury while engaged temporarily or otherwise in an occupation more hazardous than the one in which he was engaged when insured, shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury;” it was held,⁵ that the beneficiary of a mer-

¹ *Anderson et al. v. Scottish Ins. Co.*, 27 Scot. L. R. 20. See also *National Mas. Acc. Assn. v. Shryock*, 20 C. C. A. 3; 73 Fed. R. 774; 36 U. S. App. 658; *Hubbard v. Mut. Acc. Assn.*, 98 Fed. R. 930; *Carr v. Pacific Mut. L. Ins. Co.*, 100 Mo. App. 602; 75 S. W. R. 180; *Travellers Preferred, etc., Assn. v. Kelsey*, 46 Ill. App. 371.

² *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100.

³ *Travelers Ins. Co. v. Murray*, 16 Col. 296; 26 Pac. R. 774. But see, to the contrary, *Fitton v. Accidental Death Co.*, 17 C. B. (N. S.) 22.

⁴ *Standard L. & Acc. Ins. Co. v. Martin*, 133 Ind. 376; 33 N. E. R. 105.

⁵ *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; 25 N. E. 642; 10 L. R. A. 383; affirming 33 Ill. App. 178.

chant, who is accidentally killed while hunting for recreation, can recover the amount provided for the occupation of "merchant" instead of that provided for a "hunter." The court says: "The word, 'occupation,' as found in this by-law, must be held to have reference to the vocation, profession, trade, or calling, which the insured is engaged in for hire, or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of a man in any or all occupations; or from engaging in mere acts of exercise, diversion or recreation. This view is not subversive of the word, temporarily, found in such section, for there would be full opportunity for giving force and effect to it in the fact that a professional man, merchant, or person, in some other calling should temporarily abandon such location and for purposes of profit, or as a means of gaining a subsistence, temporarily employ himself in some more hazardous occupation." Other cases are to the same effect, that hunting for pleasure is not to be regarded as an occupation, and is not to be used as a basis of classification in determining the amount of indemnity payable to the insured.¹ It has been held² that a proviso of an accident insurance policy that the insurer shall not be liable "if the insured is injured in any occupation or exposure classed by this company as more hazardous than that here given" refers to classes of occupation, and not to particular acts not embraced in the occupation given, and hence does not defeat recovery for the accidental death of one insured as a mining expert while

¹ *Willey Cas. Co. v. Sheppard*, 61 Kan. 351; 59 Pac. R. 651; 47 L. R. A. 650; *Wilkinson v. Travelers Ins. Co.* (Tex. Civ. A.), 72 S. W. R. 1016; *Kentucky L. R. A. Ins. Co. v. Franklin*, 102 Ky. 512; 43 S. W. R. 709; *Thomas v. Masons, etc., Assn.*, 64 App. Div. 22; 71 N. Y. Supp. 692; *Star Acc. Ins. Co. v. Sibley*, 57 I. I. App. 315; *Holiday v. American M. Acc. Assn.*, 103 Ia. 178; 72 N. W. R. 448.

² *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458; 41 L. R. A. 467; 53 Pac. Rep. 918.

casually riding on a locomotive. So a bank cashier does not as a matter of law, lose his right to recover under a policy, providing that it shall be wholly void as to all accidents occurring while engaged in any professional employment or exposure not rated as a professional occupation by sawing off blocks for his own use from a board.¹ So where the deceased was an earthenware manufacturer, and received a fatal injury from an accident which happened while he was assisting in hauling hay from the farm, while on a visit to his grandfather, it was held no change of occupation within the meaning of the policy.² So, where a teacher, while overlooking a building he was having erected, fell from the second story and was killed, it was held that the language of the condition had respect to employment and not to individual acts.³ In another case,⁴ the deceased was insured as "a grocer delivering goods," an instruction was approved to the effect that a grocer delivering goods, as expressed in the contract, was not one who is engaged as a dealer in groceries and habitually delivers in person goods sold to his customers. An occasional delivery by himself — the rule being that delivery is made by others, — would not change his occupation. And where a person was insured as a "farmer," the fact that he was drowned while saving persons from a wreck will not justify the defense that he was employed in "wrecking" at the time of his decease.⁵

¹ *Hess v. Preferred, etc., Assn.*, 112 Mich. 196; 79 N. W. R. 460; 40 L. R. A. 444. See also *Fox v. Mason's Fraternal Accident Assn.*, 96 Wis. 390; 71 N. W. R. 363; *Yancy v. Aetna Life Ins. Co.*, 108 Ga. 349; 33 S. E. R. 979; *Johnson v. London, etc., Co.*, 115 Mich. 86; 72 N. W. R. 1115; 40 L. R. A. 440.

² *Insurance Co. v. Burroughs*, 69 Pa. St. 43.

³ *Stone's Admrs. v. U. S. Casualty*, 34 N. J. 371. See also *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180; *Provident L., etc., Co. v. Martin*, 32 Md. 310; *Miller v. Ins. Co.*, 39 Minn. 548; 40 N. W. R. 839.

⁴ *Hall v. American Masonic Acc. Assn.*, 86 Wis. 518; 57 N. W. R. 366.

⁵ *Tucker v. Mut. Ben., etc., Co.*, 50 Hun. 50; 4 N. Y. Supp. 55.

A distinction has been made which is illustrated in the case of *Estabrook v. Union Casualty & Surety Co.*¹ where the court said: 'The plaintiff was insured as proprietor of a gristmill; supervision only,'—an occupation classed as preferred. The policy provided that in case of an injury received in any occupation or exposure classed as more hazardous than preferred, the insured should recover only such amount as the premium paid would have purchased at the rates fixed for such increased hazard. Among the occupations classed as more hazardous was that of farmer and farm laborer. On the 8th day of July the plaintiff went to his father's farm in Danville, to assist temporarily, during the absence or disability of his father, in overseeing the work of haying, then being carried on by hired help. On the following day a shower came up, and the plaintiff jumped onto a horserake, and started hastily to drive it under cover, and was injured in so doing. The case finds that the work being performed by plaintiff at the immediate time of his injury was work ordinarily performed by a farmer and farm laborer. It is doubtless true that individual acts outside the stated occupation do not constitute a change of employment, within the meaning of the provision above recited. Such a provision may well be construed to permit the occasional doing of the various acts of recreation, exercise, accommodation, and duty which are recognized as proper incidents in the lives of men of all occupations. The merchant spends a day in hunting; the agriculturist acts as superintendent of police at a fair; the teacher looks after the workmen who are building his barn; the manufacturer, visiting a relative, assists in loading hay; the farmer goes to the rescue of a shipwrecked crew; the supervising farmer repairs a bridge upon his own land, — and these things are held not to constitute a change of occupa-

¹ 74 Vt. 202; 52 Atl. R. 148.

tion.¹ But we think the work in which the plaintiff was engaged at the time of his injury cannot be treated as incidental and occasional, within the meaning of these decisions. His was not the case of a visiting relative who rides the horserake, or throws on a load of hay by way of amusement, exercise, or accommodation. He went to take his father's place because of his father's disability, and presumably would have continued in that place until the haying was done if he had remained uninjured, and his father's disability had continued so long. The work undertaken was not the doing of a single act, nor the rendering of occasional assistance. It was the continuous performance of the series of acts which constitute the occupation of haying season. In thus taking his father's place, he assumed, for the time being, his father's occupation, and brought himself within the clause under consideration. It cannot reasonably be said that the company assumed the hazard of this work at the premium charged for the lesser risk. We reach this conclusion without considering the meaning of the term 'exposure,' or giving any effect to it." The phrase "cattle shipper and tender in transit" does not include tender of horses in transit.² It is a question for the jury to determine whether a man is injured while performing an act peculiarly embraced in another occupation and not in that in which he was insured, as where a stationary engineer was killed while chopping wood.³ A "supervising farmer," within the classification of an accident policy, may include one who

¹ *Association v. Frohard*, 134 Ill. 228; 25 N. E. 642; 10 L. R. A. 383; 23 Am. St. Rep. 664; *Association v. Kelsey*, 46 Ill. App. 371; *Stone's Adm'rs v. Casualty Co.*, 34 N. J. Law, 371; *Insurance Co. v. Burroughs*, 69 Pa. 43; 8 Am. Rep. 212; *Tucker v. Insurance Co.*, 50 Hun, 50; 4 N. Y. Supp. 505; *Society v. Taylor*, 42 Ill. App. 97.

² *Brock v. Brotherhood Acc. Co. (Vt.)*, 54 Atl. Rep. 176. But see *Loesch v. Union Casualty and Surety Co.*, 176 Mo. 654; 75 S. W. R. 621.

³ *Eggenberger v. Guarantee Mut. Acc. Co.*, 41 Fed. 172.

does light physical labor, incidentally in keeping things in order and repair, as well as one who does no physical labor; and where such a person was injured while engaged in driving posts or piles for a private bridge, he is not at the time of his death engaged in the occupation of pile driver within the meaning of an accident insurance policy declaring such an occupation more hazardous than that of farming.¹ Where the plaintiff was insured as a jobber and contractor, but was injured while employed as a farm hand, and the company had a classification for jobber and contractor, but not for farm hands, it was held that after the injury the company could not classify the occupation as a farm hand, so as to lessen the amount to be recovered.² A cattle dealer, insured under an accident policy which permits him to attend his cattle in transit on the cars, can rightfully do on such a trip whatever is customary among reasonably prudent cattle dealers under like circumstances.³ The word "bicycling" in an accident policy refers only to professional riders, not to one riding as an incident and for pleasure.⁴ If, under the contract, an employment is permitted different from the one named in the application, but the amount of insurance is reduced accordingly, it was held that where one insured as a "spare conductor" was killed while performing the duties of a brakeman the amount due on the death of a brakeman alone could be recovered. One insured as a yard-

¹ *National Acc. Soc. v. Taylor*, 42 Ill. App. 97.

² *Bushaw v. Woman's Mut., etc., Co.*, 8 N. Y. Supp. 423.

³ *Pacific Mut. L. Ins. Co. v. Snowden*, 7 C. C. A. 264; 58 Fed. 342; *Jameson v. Continental Cas. Co. (Mo. App.)*, 78 S. W. R. 812.

⁴ *Baldwin v. Fraternal Acc. Assn.*, 21 Misc. 124; 46 N. Y. Supp. 1016; *Comstock v. Fraternal Acc. Assn.*, 116 Wis. 382; 93 N. W. R. 22. But see *Appel v. Aetna L. Ins. Co.*, 86 App. Div. 83; 83 N. Y. Supp. 238; also *Eaton v. Atlas, etc., Co.*, 89 Me. 570; 36 Atl. R. 1048.

⁵ *Aldrich v. Mercantile Mut. Acc. Assn.*, 149 Mass. 457; 21 N. E. R. 873.

master cannot recover if injured as a yard conductor.¹ Nor a blacksmith if injured while coupling cars.² But one insured as a railroad employe and who had paid a higher premium in consequence, can recover for an injury received while boarding a moving train incident to such employment although at the time he was a farmer and not such an employe.³ Where the insured who stated his occupation to be that of a "retired gentleman" was injured while operating a buzz saw for his own amusement it was held that the operation of the buzz saw was not incident to the occupation or condition of a retired gentleman.⁴ A person who is baggage-checker of a transfer company which business requires him to meet and board incoming trains and check baggage to other railroad lines is a "railroad employe," within the meaning of that expression in an accident insurance policy.⁵ So an "ice-man, proprietor," is engaged in his occupation while engaged in the delivery of ice, although proprietor of the business, in spite of the fact that the rules of the company provide that one delivering ice cannot receive so large a weekly sum as a proprietor.⁶ So the occupation of "livery stable proprietor (not working)," is correctly stated although he sometimes hitched up a horse and drove persons out.⁷ A classification on the back of a policy will

¹ *Moore v. Citizens M. L. Ins. Co.*, 75 Hun, 262; 26 N. Y. Supp. 1014. See also *Hoffman v. Standard L. & A. Co.*, 127 N. C. 337; 37 S. E. R. 466.

² *Standard L. & A. Ins. Co. v. Taylor*, 12 Tex. Civ. A. 386; 34 S. W. R. 781. See also *McNevin v. Canadian, etc., Co.*, 32 Ont. 284.

³ *Employers' Liability Ass. Corp. v. Rochelle*, 13 Tex. Civ. A. 232; 35 S. W. R. 869.

⁴ *Knapp v. Preferred Mut. Acc. Assn.*, 53 Hun, 84; 6 N. Y. Supp. 57. See also *Dennison v. Masons, etc., Acc. Assn.*, 59 App. Div. 294; 69 N. Y. Supp. 291.

⁵ *Cotton v. Fidelity & Casualty Co.*, 41 Fed. R. 506.

⁶ *Nafie v. Manufacturers Acc. Indemnity Co.*, 55 Hun, 111; 8 N. Y. Supp. 202.

⁷ *Brink v. Guarantee Mut. Acc. Assn.*, 7 N. Y. Supp. 847.

not control the express stipulation in the policy.¹ Unless so stipulated in the policy a change in the risk, whether increasing the hazard or not, will not avoid the contract.² Where a policy contained a provision that it should not cover injuries received in "adventures into wild and uninhabited, or uncivilized regions," the company was held liable where the insured had started on a journey into the interior of Alaska but was drowned while navigating a well-known bay on the sea coast before he had entered upon the inland journey.³

§ 492. Voluntary Exposure to Unnecessary Danger: Obvious Risk — Due Diligence to Avoid Danger. — Accident policies usually provide that the insurance shall not cover "where the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazardous or perilous adventure:" or where the injury or death has occurred where the risk was obvious." The party insured is also required "to use all due diligence for personal safety and protection." These conditions may be appropriately discussed at the same time. The United States Court of Appeals,⁴ has approved an instruction as follows: "An exposure, in order to have been a contributing cause, and so defeat the plaintiff's right to recover, must be something beyond the ordinary, or a wanton, a piece of gross, carelessness, as we would term such in our designation, of a person's conduct in the usual walks of life." It is where a man "acts so recklessly and carelessly that he shows an utter disregard of a known

¹ *Ford v. U. S. Mut. Acc. Relief Co.*, 148 Mass. 153; 19 N. E. R. 169; *Stone v. United States Casualty Co.*, 34 N. J. L. 371.

² *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180.

³ *Ætna Life Ins. Co. v. Frierson*, 51 C. C. A. 424; 114 Fed. R. 56.

⁴ *Manufacturers Accident Indemnity Co. v. Dorgan*, 7 C. C. A. 588; 58 Fed. Rep. 945; 22 L. R. A. 620.

danger.”¹ Not however mere carelessness.² The Supreme Court of Pennsylvania,³ has said: “To make him (assured) guilty of a voluntary exposure to danger he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous.” So, in that case, it was held that the assured was not guilty of a voluntary exposure to danger although he stepped off a railway train, stopped at a drawbridge at night, and fell through a concealed hole in the bridge and was killed. It was shown that other passengers alighted and the lantern of the brakeman cast its shadow over the hole, making it impossible for the assured to see it. The court continues: “It is true, that he voluntarily left the car, but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary yet the exposure involuntary. The danger being unknown the injury is accidental.” The insured must be aware of the danger and voluntarily assume it.⁴ The term means “a conscious intentional exposure, something which one is willing to take the risk of.”⁵ The question is usually one of fact and for the jury.⁶ There can be no voluntary

¹ *De Loy v. Travelers Ins. Co.*, 171 Pa. St. 1; 32 Atl. R. 1108.

² *Lehman v. Great Eastern, etc., Co.*, 158 N. Y. 689; 53 N. E. R. 1127.

³ *Burkhard v. Travelers Ins. Co.*, 102 Pa. St. 262; s. c. 48 Am. R. 205.

⁴ *Ashenfelter v. Employers, etc., Corp.*, 87 Fed. R. 682; 31 C. C. A. 193; 59 U. S. App. 479.

⁵ *Johnson v. London, etc., Co.*, 115 Mich. 86; 72 N. W. R. 1115; 40 L. R. A. 440.

⁶ *Collins v. Fidelity, etc., Co.*, 63 Mo. App. 253.

exposure if the insured was ignorant of the danger,¹ and cases as to contributory negligence do not apply.² Although under the peculiar wording of the contract the principles of the law of negligence may govern.³ In a case in New York,⁴ the assured was crossing a railroad track and, when part the way over, had his view obstructed. As he was approaching he was called to, to look out, but, hastening forward, was killed by the train. It was held that whether he had used due diligence, was for the jury to determine. In defining the word "voluntary" the court said: "The word, of course, in some way refers to the action of the will, used as it is in the policy by an insurance company, to be understood by men of ordinary information and intelligence. It does not involve the opposing view of philosophers as to free will or determinism; but by all it is considered that the will acts from motives springing from things external to the will and that such motives have an influence more or less controlling upon the will and tending to induce it to act in a certain way. In common apprehension in respect to the ordinary transactions of life, if the external circumstances would have such a controlling influence upon a man of ordinary prudence and intelligence that he would take a certain course, that course would not be considered voluntary on his part, his course would not be freely taken. It would be controlled by external circumstances." The following occurrences have been held not to come within the exception so as to relieve the company: Where a traveler by railroad, while asleep and unconscious, involuntarily arose and walked to

¹ *Commercial, etc., Assn. v. Springsteen*, 23 Ind. App. 657; 55 N. E. R. 973.

² *Travelers Ins. Co. v. Randolph*, 24 C. C. A. 305; 78 Fed. R. 754; 47 U. S. App. 260.

³ *Price v. Standard L. & A. Ins. Co. (Minn.)*, 99 N. W. R. 887.

⁴ *Duncan v. Travelers Mut. Acc. Assn.*, 59 N. Y. Sup. Ct. 145; 13 N. Y. Supp. 620.

the car platform and fell therefrom and was killed.¹ Where the engineer on a locomotive, while going into the tender to put on a brake, which was properly the fireman's business, slipped, fell and was killed, it was held he was not needlessly exposing himself.² Where the person injured stood upon the joist of the second floor of a building which was being erected for him and it broke, caused him to fall and be killed, it was held that he was using due diligence at the time.³ So an attempt to get upon the cars while they are in motion is not always a willful and wanton exposure to unnecessary danger.⁴ So where a passenger, after the train had reached his station, got off and after the train had begun to move, attempted to get on while the train was in motion and was killed, the court held that it was natural and prudent for a man who wanted to go on in the train to get on while it was moving.⁵ And passing from one car to another while in motion, in a way that was contemplated and was possible, is not exposure to unnecessary danger unless done at night.⁶ So the cleaning of a gun not known to be loaded, which is discharged on account of an unknown defect, is not a voluntary exposure to unnecessary danger.⁷ In the case last cited the court says: "We do not think these words the entire equivalent of ordinary negligence. A degree of consciousness of danger is necessary before there could be that voluntary exposure

¹ *Schneiderer v. Travelers Ins. Co.*, 58 Wis. 13.

² *Provident L., etc., Co. v. Martin*, 32 Md. 310.

³ *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371.

⁴ *Schneider v. Provident, etc., L. Ins. Co.*, 24 Wis. 28; *Sawyer v. U. S. Casualty Co.*, 8 Am. L. R. (N. S.) 233.

⁵ *Tooley v. Railway Pass. Assn.*, 3 Biss. 399; Fed. Cas. No. 14,098. See also *Pacific Mut. L. Ins. Co. v. Snowden*, 7 C. C. A. 264; 58 Fed. R. 342; 12 U. S. App. 704.

⁶ *Sawtell v. Ry. Pass. Assn. Co.*, 15 Blatchf. 216. See also *Robinson v. U. S. Ben. Soc. (Mich.)*, 94 N. W. R. 211.

⁷ *Miller v. Am. Mut. Acc. Ins. Co.*, 92 Tenn. 167; 21 S. W. 39; *Union Cas. Co. v. Goddard (Ky.)*, 76 S. W. R. 832; 25 Ky. L. R. 1035.

to unnecessary danger required to prevent indemnity.” One does not voluntarily expose himself to unnecessary danger by attempting to scale a bank with a loaded gun.¹ Nor by attempting to ford a swollen stream, although it was known that such an attempt would be attended with danger.² Nor by using a rope sling in an attempt to get pigeons out of the loft of a barn.³ Nor by seining in a river in which there were sink holes.⁴ Nor by traveling during a storm and being frozen to death.⁵ Nor does an unarmed man voluntarily expose himself to unnecessary danger by advancing with offensive words, upon one with whom he had previously had trouble but whom he did not know was armed, and who killed him.⁶ Nor one who, passing out on the street about midnight, from a house of ill-fame, was killed in a controversy arising about the payment for a hack.⁷ Where the insured, while asleep on the top of the boilers of a steamboat, was injured by steam escaping from the safety valve, it was held that he did not voluntarily expose himself to unnecessary danger, unless he was conscious of the danger, it not being sufficient to preclude him from recovery that he had been warned of the danger of being on the top of the boilers.⁸ And so where injuries are received

¹ *Cornwell v. Fraternal Acc. Assn.*, 6 N. D. 201; 40 L. R. A. 437; 69 N. W. R. 191. But see *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29; 87 N. W. R. 769.

² *United States Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516; 40 L. R. A. 453; 47 N. E. R. 544.

³ *Matthes v. Imperial Acc. Assn.*, 110 Ia. 222; 81 N. W. R. 484.

⁴ *Conboy v. Railway Officials', etc. Assn. (Ind.)*, 46 N. E. R. 333.

⁵ *Northwest Commercial Travelers' Assn. v. London, etc., Co.*, 10 Manitoba, 537.

⁶ *Union Casualty and Surety Co. v. Harroll*, 98 Tenn. 591; 40 S. W. R. 1080. See also *Campbell v. Fidelity & Casualty Co.*, 109 Ky. 661; 60 S. W. R. 492.

⁷ *Jones v. United States Mut. Acc. Assn.*, 92 Ia. 652; 61 N. W. R. 485.

⁸ *Travelers Insurance Co. v. Clark*, 109 Ky. 350; 59 S. W. R. 7.

while attempting to rescue persons from supposed danger, the company is still liable.¹ Nor can it be said that where the passenger on a railroad train goes out on the platform while the train is in motion because he is overcome by heat of the car, or suffering from nausea, he voluntarily exposes himself to unnecessary danger.² So where the insured was found on the railroad tracks in a situation which showed that he had been killed by a certain train, but the evidence did not show the other circumstances attending the manner he had come to his death, the court on appeal refused to disturb the verdict for plaintiff.³ And where the accident occurs and injuries result because of exposure to a danger contemplated by the parties, the company is liable, as where a man, insured as a brick mason, was injured while engaged in doing something pertaining to his occupation.⁴ Or where a brakeman was killed by an accident while engaged in the discharge of his duties,⁵ or where a baggage checker for a transfer company was killed while boarding a moving train.⁶ So where an employe of a railroad company was killed while on the track by a train, having been sent there to shovel snow from the crossing. It was held,⁷ that the question whether he was voluntarily exposing himself to unnecessary danger or failed to use due vigilance was for the jury. And where the policy excepts injuries occasioned by lifting or over-exertion by the insured, the lifting and over-exertion must be voluntary and unnecessary and reckless and inten-

¹ *Tucker v. Mut. Ben. L. Co.*, 50 Hun, 50; 4 N. Y. Supp. 505; *Williams v. U. S. Mut. Acc. Assn.*, 14 N. Y. Supp. 728.

² *Marx v. Travelers Ins. Co.*, 39 Fed. R. 321.

³ *Badenfeld v. Mass. Mut. Acc. Assn.*, 154 Mass. 77; 27 N. E. R. 769.

⁴ *Wilson v. N. W. Mut. Acc. Assn.*, 53 Minn. 470; 55 N. W. 626.

⁵ *National Ben. Assn. v. Jackson*, 114 Ill. 535; 2 N. E. R. 414; see also *Shilling v. Accidental Death Ins. Co.*, 1 F. & F. 116.

⁶ *Cotton v. Fidelity & Casualty Co.*, 41 Fed. 506.

⁷ *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 12 N. E. R. 372.

tional, and not used in an emergency of danger.¹ It has been held,² that it is a voluntary exposure to unnecessary danger during a dark and rainy night for a person, with two packages in his hands, to attempt, by choice, to pass over a trestle which he knows to be dangerous, other ways of travel being open to him, and this, too, although it was his usual way of travel to his home and he had been going that way for ten years and many others went the same way. And so where the assured, in order to avoid arrest, attempted to escape from a second story window of a house by means of a strip of ticking selvage six inches wide, it was held that it was a plain case of voluntary exposure to unnecessary danger.³ Walking on a railroad track a dark and rainy night at a time when deceased knew trains were frequently passing both ways is an "obvious" risk.⁴ It is voluntary exposure to unnecessary danger for a person to drive into a railroad yard and across the tracks after having been warned of danger.⁵ So to run on a railroad track in front of a moving train, in order to get on a train approaching in another direction.⁶ Or to cross between the cars of a freight train.⁷ Or going on the platform of a car before arriving

¹ *Reynolds v. Equitable Acc. Assn.*, 49 Hun, 605; 59 Hun, 13; 1 N. Y. Supp. 738. See also *Metropolitan Acc. Assn. v. Bristol*, 69 Ill. App. 492; *Rustin v. Standard L. & A. Ins. Co.*, 58 Neb. 792; 79 N. W. R. 712; 46 L. R. A. 253; *Standard L. & A. Ins. Co. v. Schmaltz*, 66 Ark. 588; 53 S. W. R. 49. See also *McKinley v. Bankers Acc. Ins. Co.*, 106 Ia. 81; 75 N. W. R. 670; *Rose v. Commercial, etc., Assn.*, 12 Pa. Super. Ct. 394.

² *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; 7 S. E. 83.

³ *Shaffer v. Travelers' Ins. Co. (Ill.)*, 22 N. E. 589; affg. 31 Ill. App. 112.

⁴ *Lowell v. Acc. Ins. Co.*, 5 Ins. L. J. 877; *Wright v. Sun Mut. Ins. Co.*, 29 Upper Canada (C. P.), 221.

⁵ *Neill v. Travelers Ins. Co.*, 17 Can. L. J. 44.

⁶ *Tuttle v. Travelers Ins. Co.*, 134 Mass. 175; s. c. 45 Am. R. 316.

⁷ *Willard v. Masonic Eq. Acc. Assn.*, 169 Mass. 288; 47 N. E. R. 1006; *Shevlin v. Mut. Acc. Assn.*, 94 Wis. 180; 68 N. W. R. 866; 36 L. R. A. 52; *Bean v. Employers, etc., Corp.*, 50 Mo. App. 459.

at a station.¹ Although it has been held that it is a question for the jury.² Jumping from a moving train is within the exception,³ and so is sitting on the end of the ties near the rails of a railroad track.⁴ Or unnecessarily crossing the track in a yard to save a walk to the station.⁵ It has been held that it is not as a matter of law a voluntary exposure to unnecessary danger to attempt to board a moving train⁶ nor a moving street car.⁷ And so where a passenger was injured by putting his arm out a car window.⁸ Where the assured undertook in the day-time to cross railroad tracks near a station at a place where they were commonly crossed by people with permission of the company, and he was struck and killed by a detached freight car which had been "kicked along the track," the sight of which was cut off by an umbrella which he carried to protect himself from the rain, it was held,⁹ that the question whether the insured was violating a condition of the policy against voluntary exposure to unnecessary danger and requiring the insured to use due diligence for personal safety was for

¹ *Overbeck v. Ins. Co.*, 94 Mo. App. 453; 68 S. W. R. 236.

² *Travelers Ins. Co. v. Randolph*, 24 C. C. A. 305; 47 U. S. App. 260; 78 Fed. R. 754.

³ *Smith v. Preferred M. Acc. Assn.*, 104 Mich. 634; 62 N. W. R. 990.

⁴ *Standard L. & A. Ins. Co. v. Langston*, 60 Ark. 381; 30 S. W. R. 427.

⁵ *Glass v. Masons Frat. Acc. Assn.*, 112 Fed. R. 495.

⁶ *Fidelity, etc., Co. v. Sittig*, 181 Ill. 111; 54 N. E. R. 903; 48 L. R. A. 359; affg. 79 Ill. App. 245. But see *Small v. Travelers Prot. Assn. (Ga.)*, 45 S. E. R. 706; *Travelers, etc. v. Small*, 115 Ga. 455; 41 S. E. R. 624.

⁷ *Johanns v. National Acc. Ins. Co.*, 16 App. Div. 104; 45 N. Y. Supp. 117.

⁸ *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush, 535. It is doubtful, however, if this case is good authority. See *Farlow v. Kelly*, 11 Am. & Eng. R. R. Cases, 101, note. See also *Payne v. Fraternal Acc. Assn.*, 119 Ia. 342; 93 N. W. R. 361.

⁹ *Keene v. N. E. Mut. Acc. Assn.*, 161 Mass. 149; 36 N. E. R. 891; see also *Follis v. U. S. Mut. Acc. Assn.*, 94 Ia. 435; 62 N. W. R. 807; 28 L. R. A. 78.

the jury. In this case,¹ the court said: "Clearly, a contract of indemnity against accidents should be construed with more liberality to the assured than the rules of common law if the same person seeks under them to put the responsibility for his accident upon another. Looking, then, at the policy with reference to the subject of the contract of insurance, the first provision relied on in defense is against 'any voluntary exposure to unnecessary danger, hazard, or perilous adventure.' A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. The policy recognizes that there are some dangers which it is necessary to encounter; as, for example, where there is a chance to rescue persons in deadly peril.² There are other dangers which one usually need not encounter if he knows of their existence long enough beforehand, — as, for example, the danger from a runaway horse or a coming car; and a merely inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious, intentional exposure, — something which one is consciously willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence. Great negligence will not necessarily defeat a fire policy.³ And in the present policy against accidents, upon the evidence, although the jury might well find a voluntary exposure to danger, we cannot say that it would be bound as a matter of law to do so. It did not appear that the deceased was a trespasser. The testimony tended to show that it was a common thing for persons to cross the

¹ *Keene v. N. E. Mut. Acc. Assn.*, *supra*.

² *Tucker v. Insurance Co.*, 50 Hun, 50; 4 N. Y. Supp. 505.

³ *Johnson v. Insurance Co.*, 4 Allen, 388.

railroad tracks all along there where the deceased was crossing. Notices were indeed posted up by the railroad company to prohibit it, but no other attempt was made to stop the practice. Two witnesses testified that from 1,000 to 2,000 persons a day crossed there, and this habit of so crossing had continued for years. This would go to show that the deceased was not a trespasser. The deceased was not attempting to walk upon the track, or to remain upon it; but he was simply crossing at a quick pace. He was hit, not by an engine, with its noise, but by a detached car which had been kicked along there, the sight of which was cut off by his umbrella. Construing the clause in the policy against 'voluntary exposure to unnecessary danger' with reference to the subject of the contract, and also in connection with the other provisions against intentional acts which are found in the same sentence, the act of the deceased, as described by the witnesses, was not necessarily to be deemed a violation of it. The next provision is: 'The certificate holder is required to use all due diligence for personal safety and protection.' This phrase is very general, and certainly it does not mean that the assured must guaranty himself against accidents; nor do we think it means that he shall not recover for any accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. Due diligence or care is sometimes said to be reasonable diligence or care and reasonable care is sometimes said to be the ordinary care of prudent persons. It is not a precise term, but a relative one. In an accident policy it would not be reasonable to hold that this clause requires of the assured a higher degree of diligence than prudent persons are accustomed habitually to use. Under such a construction, few persons would care to have an accident policy. The due diligence required is not inconsistent with inadvertence, nor with running such risks as

prudent and cautious persons habitually run; and, upon the evidence, the act of the deceased was not necessarily to be deemed a violation of this provision. This conclusion is made the more clear by a reference to the latter provision which allows a reduced recovery for injuries received while walking or being on the roadbed or bridge of a railway. If walking on the roadbed of a railway will not defeat a claim under the policy, it is not to be supposed that the contract means that merely crossing a railroad track should necessarily have that effect. Whether merely crossing the railroad should in the present case reduce the plaintiff's claim to the lower classification we do not determine, as this question was not presented by the ruling at the trial, and has not been argued by the defendant.¹ The defendant has strongly relied on *Tuttle v. Insurance Co.*² In that case the deceased was, on a dark evening, running along on a railroad track, and was killed by a train which came up from behind. He made the railroad track his path for travel, and did it unnecessarily. A reference to the original papers in the case shows that it appeared in evidence that the railroad station to which he was going was on the same side of the tracks as the hotel from which he started, and that it could be reached from the hotel by public ways, without crossing any tracks. A plan was also referred to which (speaking from present memory) showed that the convenient and natural mode of going from the hotel to the station, especially in the evening, was by the public ways. Under these circumstances it was held that the act of the deceased in going upon and along the railroad track on a dark evening, when trains were coming and going over it, was an exposure to an obvious and unnecessary danger, and was not using all due diligence for personal safety and

¹ *Duncan v. Accident. Assn.* (Super. Ct. N. Y.), 13 N. Y. Supp. 620.

² 134 Mass. 175.

protection. That case in its facts and circumstances was quite different from the present." "Due diligence" means reasonable diligence, and the question whether it has been used is for the jury.¹

§ 493. **Poison : Gas.** — We have already treated of the condition usually found in accident policies, that the company shall not be liable if the death be caused by "inhaling gas,"² and have seen that the exception only applies to gas administered purposely for medical or surgical treatment, and not when death is caused by suffocation caused by illuminating gas, nor when death results from the accidental inhaling of noxious gas by a person working in a well.³ It is not therefore necessary to discuss this branch of the subject further. The word "poison" as used in insurance policies, should have the interpretation usually placed upon it as commonly used and defined. Where it is provided in the policy that it "shall not cover injuries fatal or not fatal resulting from any poison or infection, or from any thing accidentally or otherwise taken, administered, absorbed or inhaled," the exception applies whether the poison be taken intentionally or unintentionally. As was said by the Supreme Court of Pennsylvania :⁴ "It is not necessary that the poison be taken with an intent to produce death to defeat a claim flowing from the right of membership. If the poison be innocently taken and without any knowledge of the injurious effect which it was likely to produce, and did produce so far as the person taking it is concerned, the effect may be said to be accidental. If we go a step further and admit in such case

¹ *Kentucky L. & A. Ins. Co. v. Franklin*, 102 Ky. 512; 43 S. W. R. 709.

² *Ante*, § 489 and also § 483.

³ *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79; 22 Atl. R. 871; 13 L. R. A. 661.

⁴ *Pollock v. U. S. Mut. Acc. Assn.*, 102 Pa. St. 230.

that the means are accidental, yet it is one of the accidental means expressly excepted from the protective power of the certificate." So where the insured took "birch oil," which is poisonous, by mistake for "milk of birch," which is harmless, and died in a few hours, it was held that there could be no recovery.¹ And so where the assured by mistake took poison instead of his usual medicine it was held there could be no recovery.² And so where a dose of opium was prescribed and by inadvertence the insured took too much.³ Where chloroform was administered by a surgeon and the insured in some way suffocated it was held that the company was not liable.⁴ And where blood poisoning resulted from cotton placed to check hemorrhage after a tooth had been extracted.⁵ The sting of an insect is not poison within the exception.⁶ Nor septic poisoning resulting from a surgeon's accidentally cutting himself.⁷ A somewhat different view of this condition has been taken by other courts. It has been said:⁸ "It is settled by the judgments below that the death of the insured was caused by accident. Mistaking a bottle of carbolic acid for peppermint, which he wished to take for some ailment, he poured a portion of the acid into a glass of water, drank it, and

¹ *Pollock v. U. S. Mut. Acc. Assn.*, *supra*. See also *Hill v. Hartford Acc. Ins. Co.*, 22 Hun, 187; *Cole v. Accidental Ins. Co.*, 61 L. T. 227.

² *Cole v. Accident Ins. Co.*, 61 L. T. R. (N. S.) 227.

³ *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. 143; Fed. Cas. 1,138. See also to the same effect *Early v. Standard L. & A. Assn.*, 113 Mich. 58; 71 N. W. R. 500; *McGlothter v. Provident M. Acc. Co.*, 32 C. C. A. 318; 89 Fed. R. 685; 60 U. S. App. 705; *Preferred Acc. Ins. Co. v. Robinson (Fla.)*, 33 Sou. R. 1005; 61 L. R. A. 145; *Maryland Cas. Co. v. Hudgins (Tex.)*, 76 S. W. R. 745; *revers. (Tex. Civ. A.)* 72 S. W. R. 1047.

⁴ *Westmoreland v. Preferred Acc. Assn.*, 73 Fed. R. 244.

⁵ *Kasten v. Interstate, etc., Co.*, 99 Wis. 73; 74 N. W. R. 534; 40 L. R. A. 651.

⁶ *Omberg v. U. S. Mut. Acc. Assn.*, 101 Ky. 303; 40 S. W. R. 909.

⁷ *Braymer v. Commercial Acc. Co.*, 199 Pa. St. 259; 48 Atl. R. 972.

⁸ *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; 43 N. E. R. 765.

died from the poison. The only question presented for our decision is, is the appellant exempted from liability on the ground that the insured died from 'taking poison' within the meaning of the policy? Appellant contends that it is so exempt by the terms of the contract; that the term 'taking poison,' as used in the policy, and according to its ordinary signification, includes accidental as well as intentional taking; and cites *Pollock v. Accident Assn.*¹ which so holds. Appellee, however, contends, and in this she is supported by the appellate and circuit courts, that the words 'taking poison' as employed in the policy, and in view of the rules of construction applied by the courts to such instruments, mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning; and counsel contend that this court has, in effect, so decided in *Healy v. Accident Assn.*² While the precise point here at issue was not discussed in the opinion in the Healy Case, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in the Healy Case, including *Paul v. Insurance Co.*³ and *Pollock v. Accident Assn.*⁴ and it was then said: 'While we recognize the high ability of the court in which the case (the Pennsylvania case) was decided, we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question.'⁵ We are inclined to the

¹ 102 Pa. St. 230.

² 133 Ill. 556; 25 N. E. R. 52.

³ 112 N. Y. 472, 20 N. E. 347; 3 L. R. A. 443.

⁴ 102 Pa. St. 230.

⁵ See also *Pickett v. Insurance Co.*, 144 Pa. St. 79; 22 Atl. 871; 13 L. R. A. 661; *Meneilley v. Assurance Corp.* (N. Y. App.), 43 N. E. 54.

opinion that the term 'taking poison' would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and conscious act. If in speaking of the cause of the death of another we should say. 'He took poison,' we would most commonly be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say 'he intentionally took poison;' and if it were designed to avoid such understanding, we would naturally say 'he accidentally took poison,' or would use some other qualifying words indicating that the act was accidental, or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would therefore seem to be eminently proper in such a case to apply the well-known rule of construction applicable to such instruments, — that, where there is a doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim, to indemnify which, in making the insurance, it was his object to secure." In another case,¹ where the condition was a little different, the same court said: "The principal question in this case is like the one involved in *Insurance Co. v. Dunlap*, in which an opinion was filed at the present term of this court² and it must be controlled by that decision. Instead of using the term 'taking poison,'

¹ *Metropolitan Acc. Assn., v. Froiland*, 161 Ill. 30; 43 N. E. R. 766; affirming 59 Ill. App. 522.

² 43 N. E. 765.

which, in that case, as used in the policy, we held to mean the voluntary taking of poison, the application in the case at bar, which was made a part of the insurance contract, contained this provision: 'I agree that this insurance shall not be held to extend * * * to poison in any way taken, administered, absorbed, or inhaled.' The principal contention of appellant is that, although it is shown, and not disputed, that the death of the member was caused by poison accidentally taken, — chloral taken by mistake for distilled water, — yet there can be no recovery, because the term 'poison in any way taken' must be held to include poison taken accidentally as well as poison taken intentionally. It is not contended that there is any difference, as a cause of death, between the term 'poison taken' and the term 'taking poison.' Indeed, the by-laws use the one term, and the application the other. But it is insisted that the qualifying words 'in any way' have relation to the motive of the insured in taking the poison, and embrace his involuntary as well as his voluntary action in that regard. We are of the opinion that the words 'in any way' relate to the mode or manner in which the poison is taken, and not to the motive of the insured in taking it." And medicine taken in good faith to alleviate physical pain is not within the condition.¹ In another case,² the assured came to his death by inhaling coal gas. The testimony of the experts was conflicting as to whether coal gas was a poison or poisonous substance and the court refused to instruct the jury that inhaling of coal gas was a taking of poison if they believed coal gas to be a poisonous substance. It was held that the refusal to so charge was not error. Where the assured came to his death from a malignant pustule, caused by contact with

¹ *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253; 75 S. W. R. 1102.

² *U. S. Mut. Acc. Co. v. Newman*, 84 Va. 52; 3 S. E. 805.

putrid animal matter, it was held ¹ that the death was from disease and not from poison within the clause. Where the words "voluntary or involuntary" are used in connection with the condition every manner of taking is included.² Where, however, there is no exception of death or injury from taking poison, a death caused by poison taken into the stomach is caused by external and violent means.³

§ 494. **Intentional Injuries: Assault, Fighting.**—It has been held, where a man was way-laid and killed by robbers, that this was a death by accident within the meaning of an accident insurance policy. The court says: "It was to him a casualty; and, in the more popular and common expectation, if not in its precise meaning, accident includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event."⁴ And where the assured died from the effects of a blow, struck by a person after an attempt to blackmail, such a death is the result of accidental means.⁵ If, however, the policy stipulates that it is not to extend to death or injuries which are the result of design, either on the part of the assured or of any other person, or where intentional injuries are inflicted by the assured or any other person,

¹ *Bacon v. U. S. Mut. Acc. Assn.*, 123 N. Y. 304; 25 N. E. 399; affg. 44 Hun, 599.

² *Kennedy v. Ætna L. Ins. Co.*, 31 Tex. Civ. A. 509; 72 S. W. R. 602.

³ *Healey v. Mut. Acc. Assn.*, 133 Ill. 556; 25 N. E. R. 52; 9 L. R. A. 371.

⁴ *Ripley v. Ry. Pass. Insurance Co.*, Federal Cases, 11, 854; 2 Big. Ins. Cas. 738. See also *Furbush v. Maryland Cas. Co.*, 131 Mich. 24; 91 N. W. R. 135; *Campbell v. Fidelity & C. Co.*, 109 Ky. 661; 60 S. W. R. 492; *Collins v. Fidelity & C. Co.*, 63 Mo. App. 253; *Lovelace v. Travelers' Prot. Assn.*, 126 Mo. 104; 28 S. W. R. 877; 30 L. R. A. 209 and note. See also where the insured was hung by a mob. *Fidelity & C. Co. v. Johnson*, 72 Miss. 333; 17 Sou. R. 2; 30 L. R. A. 206.

⁵ *Richards v. Traveler's Ins. Co.*, 89 Cal. 170; 26 Pac. R. 762; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640.

the company will not be liable where the assured is murdered.¹ In the case cited,² the court says: "The clause of the proviso that excludes appellee's liability, in case death or injury is intentionally inflicted by any other person, applies to this case. We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured and not to such injuries as the insured may receive at the hands of third persons who are attempting to do mischief generally or who are attempting to injure any particular individual other than the insured, or class of individuals, or any kind of property; for in such cases it cannot be said that the injury was intentionally aimed directly and individually at the insured." Accordingly no recovery can be had under such a policy where the insured is killed by a third person without provocation and while peaceably and lawfully engaged in his lawful business,³ and the company need not show that such injuries were inflicted at the instance of the assured.⁴ But if the death of the insured is caused by a blow dealt him, that will not prevent recovery if the

¹ *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300; 8 S. W. R. 570; *Travelers' Ins. Co. v. McCoukey*, 127 U. S. 661; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640; *Johnson v. Travellers Ins. Co.*, 15 Tex. Civ. A. 314; 39 S. W. R. 972; *Butter v. Travellers Acc. Ins. Co.*, 96 Wis. 536; 71 N. W. R. 811; *Travellers Prov. Assn. v. Langholz*, 9 C. C. A. 628; 86 Fed. R. 60; *American Accident Co. v. Carson (Ky.)*, 30 S. W. R. 879; *Matson v. Travellers Ins. Co.*, 93 Me. 469; 45 Atl. R. 518; *Fidelity & Cas. Co. v. Smith (Tex. Civ. A.)*, 391; *Orr v. Travellers' Ins. Co.*, 120 Ala. 647; 24 Sou. R. 997. But see *Buton Am. Mut. Acc. Assn.*, 92 Wis. 83; 65 N. W. R. 861, where it is held that the exception does not extend to cases where the injury is inflicted by an independent third party without the participation of the insured.

² *Hutchcraft v. Travelers' Ins. Co.*, *supra*.

³ *Fischer v. Travelers Ins. Co.*, 77 Cal. 246; 19 Pac. R. 425.

⁴ *Travelers Ins. Co. v. McCarthy*, 15 Col. 351; 25 Pac. 713; *Degraw v. National Acc. Soc.*, 51 Hun, 142; *Scherk v. Travelers' Ins. Co.*, 38 Albany L. Jr. 466.

person inflicting the blow did not mean to kill the insured.¹ It has also been held that the word "injuries" in such a clause refers to non-fatal injuries only.² The question whether the killing was intentional or accidental is one for the jury. Where the evidence is uncertain the burden of proof, the affirmative defense of intentional injuries being pleaded, is on the defendant.³ * If the policy does not provide that the company shall not be liable where the injuries are intentionally inflicted by the assured or any other person, an injury, not anticipated nor naturally to be expected by the assured, though intentionally inflicted by another, is an accident.⁴ The stipulation is valid although the insured was a policeman and paid a higher rate in consequence.⁵ But where the insured was killed by a shot fired by an insane person, such death was held not to be within the exception, because an insane person is incapable of forming an intent.⁶ The same is true where one was killed by a person too drunk to know what he was doing, and therefore incapable of forming an intent.⁷ Where the proviso is that the protection shall not be extended to injuries caused by fighting, the company is not liable where both parties engage willingly in a personal encounter, and it makes no difference

¹ *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; 26 Pac. 762.

² *Am. Accident Co. v. Carson*, 99 Ky. 441; 36 S. W. R. 169; 34 L. R. A. 301.

³ *Guldenkirch v. U. S. Mut. Acc. Assn.*, 5 N. Y. Supp. 428. See also *Railway Officials, etc., Assn. v. Drummond*, 56 N. b. 235; 76 N. W. R. 562; *Ging v. Travelers Ins. Co.*, 74 Minn. 505; 77 N. W. R. 291.

⁴ *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; 16 S. W. R. 723; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640; *Sup. Lodge O. C. F. v. Garrigus*, 10 Ind. 133; *Robinson v. U. S. Mut. Acc. Assn.*, 68 Fed. R. 825; *Hester v. Fidelity, etc., Co.*, 69 Mo. App. 186.

⁵ *Grimes v. Fidelity & Cas. Co. (Tex. Civ. A.)*, 76 S. W. R. 811.

⁶ *Berger v. Pacific M. L. Ins. Co.*, 88 Fed. B. 241; *Corley v. Travellers Pro. Assn.*, 46 C. C. A. 278; 105 Fed. R. 854.

⁷ *N. W. Benev. Soc. v. Dudley*, 27 Ind. App. 327; 61 N. E. R. 207.

in such cases whether the slayer was sane or insane.¹ In the case cited the court says: "In so far as the constituents of a fight are concerned, the consent of both parties makes the consequent violence of either chargeable to both. 'We think the judge was in error in saying there must be mutual blows to constitute a mutual combat. There must be a mutual intent to fight. But we think if this exists and but one blow be stricken, that the mutual combat exists even though the first blow kills or disables one of the parties.'"² To the like effect is a dictum by Chief Justice Pearson of North Carolina, who says: 'Is it necessary that both parties should give and take blows or is it sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent. To illustrate: Suppose Rippy had not been killed. Upon an indictment for an affray, would he not have been convicted? Two men go out to fight. One is knocked down on the 'first pass' and that is the end of it. Are they not both guilty of an affray? That is, 'a fight by mutual consent.'"³ We are not less certain that the fight was a mutual combat in the legal sense than if it had been so found by the verdict of a jury under a full and proper charge from the presiding judge; and the palpable truth that fighting caused the shooting, and therefore the injury needs confirmation by verdict just as little. The evidence is all one way; but one rational inference is possible. The shooting is accounted for easily and naturally by ascribing it to the fight. This is the proper explanation for it. Whether it be regarded as a part of the fight proper or as a sequel to it. It was certainly embraced within the *res gestæ* of the combat. It took place upon the same stage and within

¹ Gresham v. Equitable L. & Acc. Ins. Co., 87 Ga. 497; 13 S. E. R. 752; 13 L. R. A. 838.

² Tate v. State, 46 Ga. 157 (McCay, J.)

³ State v. Gladden, 73 N. C. 155.

the atmosphere of the antecedent performance. The homicide could well be treated as the culmination of the final scene, the catastrophe of the drama. At the very least it was a bloody epilogue, and not an independent after-piece. Nor is it material that it was not down on the bill but was wholly unexpected by one or both of the actors. Rarely, if ever, can the incidents or the result of a personal encounter be foreseen. A deadly weapon may make its appearance at the last moment and a homicide be the result although the fight intended and begun was one of the "fist" and "scull" only. To fight at all is dangerous. When the combative passions are aroused and get a taste of gratification, what momentum they will acquire, and to what extremes it will carry them in their lust for more, is always uncertain. Even friendly wrestling is a door by which anger and a mortal wound may come in. Knowing the hazards attendant on physical competition and contention, this insurance company declined to assume the risk of accidental injury or death caused by fighting or wrestling. The insured might fight if he pleased but he was not allowed to indulge his combative propensities at the expense of the company; that kind of indulgence was to be at his own risk. Not that the company might not have borne the risk for him if it had chosen to do so. In the language of Judge Scott in *Harper v. Insurance Co.*:¹ 'Unless it is otherwise stipulated, the insurer takes the subject insured with his flesh and blood passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance.' But in the policy before us the company has otherwise stipulated. By so doing it has narrowed the range of the policy over the emotions so as to shut out all those of a pugnacious character. If both combatants

¹ 19 Mo. 509.

contributed to bring on the fight the relative blame or guilt has nothing to do with the relation of cause and effect between it and the homicide. Nor is it of any moment to consider whether the offense committed in the end was murder or manslaughter. With or without malice in the technical sense of criminal law, the homicide was caused by the fight, as causation is understood and regarded in the law of contracts. The fight occasioned it, for the fight produced the shooting as a direct and immediate consequence. Who can doubt that the shooting grew out of the fight — sprang from it directly and immediately? Had there been no fight there would have been no shooting and no killing. It was the fight that excited the homicidal impulse, generated the desire, and the purpose to kill. There was nothing else to do it. Even if the slayer was insane or subject to homicidal mania, the mania alone was harmless; it required the superadded excitement of the fight to render it destructive. Had the insured abstained from provoking the fight or accepting a challenge, had he contributed nothing toward bringing on a useless combat, there is no probability whatever that he would have been slain. And he could no more provoke a crazy man, or accept his challenge, at the expense of the insurance company, than he could so deal with a sane man at the company's expense. Indeed, it would be more hazardous to engage in an affray with a madman than with a rational being; and any reason for protecting the company against the consequences of the less dangerous fighting will apply with increased force to the more dangerous. Injuries caused by rash or needless fighting with any description of combatant are excluded from the scope of the policy." This condition is to have a reasonable construction. As the Supreme Court of Tennessee says: ¹ "It cannot be held to mean that

¹ *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; 16 S. W. R. 726.

every frivolous controversy, which might in some sense be termed a quarrel, although it was not a dispute, or quarrel from which the insured might reasonably have expected anger to be provoked or injury to result, is within the meaning of the term used in the policy." The instruction to the jury in this case, which was approved, was: "If you believe deceased provoked *such a serious quarrel with her as that he might reasonably have expected bodily injury, then plaintiff cannot recover; but you are not to refuse to find in favor of plaintiff merely because the woman may have provoked a quarrel with the insured and then killed him, or he provoked a frivolous, or seemingly safe dispute with her, — a quarrel of a nature in which he could not reasonably have expected anger to be provoked and injury therefrom, and was killed by her, having no reason to anticipate violence." And where the policy does not cover injuries caused by fighting the insured cannot recover although he was not the aggressor.¹ Where a bartender was injured while ejecting a noisy individual from the premises it was held that such facts did not as a matter of law release the company, the policy providing that it should not cover "injuries resulting directly or indirectly from fighting, wrestling, scuffling, altercation, quarrel or assault."²

§ 945. **Intoxicants.** — One of the usual stipulations in accident insurance policies is that the company shall not be liable in case of death or injury happening to the insured while he is "under the influence of intoxicating drinks" or if such death or injury is "the result of his intoxicated condition." We have already³ considered the effect of the stipulation providing that the policy shall be void if death

¹ U. S. Acc. Co. v. Millard, 43 Ill. App. 148; See also Lovelace v. Travelers, Prot. Assn., 126 Mo. 104; 28 S. W. R. 877; 30 L. R. A. 209.

² Coles v. New York Casualty Co., 87 App. Div. 41; 83 N. Y. Supp. 1063.

³ Ante, § 328.

be caused by the use of intoxicating drinks or opium. It is not necessary, therefore, to do more than refer to a few additional cases where this question arose in actions on accident insurance policies. It has been held,¹ that evidence, in a case where a man was found drowned, that when last seen, late at night, the insured was more or less drunk and then some way from his house, near which was a bridge with low rails and lowlands covered by the river, was not so conclusive that he met his death while drunk as to warrant a nonsuit. The burden of proof is on the company to show what the condition of the insured was when he received the injury. And it is competent, in order to do this, to ask the witness whether insured impressed them as if intoxicated and whether he was drunk or sober, and whether, in their judgment, he was as capable of taking care of himself as though he were sober.² The question of intoxication being one of fact, the court will not disturb the finding of the jury when it appears to be supported by substantial evidence; as where the testimony of several witnesses was that the deceased had only taken a few glasses of beer during the evening and was not to any appreciable extent under the influence of intoxicating drink.³ It has been held,⁴ that a provision in an accident policy, exempting the insurer from liability for any injury which might happen to the insured while intoxicated, or in consequence of his having been under the influence of intoxicating liquor, is sufficient to exclude liability for all injuries suf-

¹ *Couadeau v. American Acc. Co.*, 95 Ky. 280; 25 S. W. R. 6.

² *Cook v. Standard L. & Acc. Ins. Co.*, 84 Mich. 12; 47 N. W. R. 568. As to various questions of evidence and sufficiency of the evidence, see *Prader v. National Masonic Acc. Assn.*, 95 Ia. 149; 63 N. W. R. 601; *Williams v. U. S. Mut. Acc. Assn.*, 82 Hun, 268; 31 N. Y. Supp. 343; *DeVan v. Commercial, etc., Assn.*, 92 Hun, 256; 36 N. Y. Supp. 931; *aff'd* 157 N. Y. 690; 51 N. E. R. 1090.

³ *Travelers Ins. Co. v. Harvey*, 82 Va. 949.

⁴ *Standard L. & Acc. Ins. Co. v. Jones*, 94 Ala. 434; 10 S. E. R. 530.

ferred while insured was intoxicated, whether the intoxication contributed to the injury or not. In this case¹ the court said: "We entertain no doubt but that it was competent for the parties, by appropriate stipulations, to take out of the field of inquiry and controversy, in the event a claim should be advanced for an injury alleged to be within the policy, the question whether the intoxication of the insured did in fact contribute to the injury, and to provide that the policy should not cover any injury sustained while the insured was in that condition, irrespective of any agency the fact of intoxication may or may not have had in the production of the result complained of. There can be no doubt, either, that this policy contained such a provision. It stipulates, as we have seen, that it shall not cover any accidental injury which may happen to the insured while (not in consequence of being) intoxicated; and serving to emphasize the purpose to exclude injuries suffered while the insured was under the influence of drink, whether that fact contributed to the result or not, it is provided further in the same sentence that, the exclusion shall apply also to injuries suffered in consequence of the insured having previously been under the influence of liquor, though not so at the time of the accident — a casual connection between the condition of the insured and the catastrophe being necessary in the latter case, and not essential in the former, to bring the injury within this exception to the insurer's liability.² The charges referred to above were not, therefore, open to the objection made to them, on the theory that the intoxication which would bring the case within the exception must have contributed to the injury.³ In order to relieve the company the injuries must have been sustained in consequence of the insured being

¹ *Standard L. & Acc. Ins. Co. v. Jones*, *supra*.

² *Shader v. Assurance Co.*, 66 N. Y. 441; 5 *Bigelow Ins. Cas.* 335.

³ See also *Mair v. Railway Pass. Ins. Co.*, 37 L. T. (C. P.) 356.

under the influence of drink, or effected by or resulting directly or indirectly from intoxication.¹ Death while under treatment for delirium tremens relieves the company.²

§ 496. **Suicide : Self-Inflicted Injuries.** — Like life insurance policies, those indemnifying against death or injury from accident generally contain a stipulation exempting the company from liability in case the death be caused by suicide. We have already,³ considered the cases bearing on the subject of suicide in its different phases and it is not necessary to again refer to them. Where the language used is simply that the company shall not be liable in case of suicide, the company is liable although the death occur from an act of the insured while insane. A leading case on this subject is *Accident Ins. Co. v. Crandal*,⁴ in which case the court says: “The decisions upon the effect of a policy of life insurance which provides that it shall be void if the assured ‘shall die by suicide,’ or ‘shall die by his own hand,’ go far towards determining this question. This court on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words ‘sane or insane,’ does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect.”⁵ In the last case, which was one in which the

¹ *Hester v. Fidelity & Cas. Co.*, 69 Mo. App. 186; *Campbell v. Fidelity & C. Co. (Ky.)*, 69 S. W. R. 492.

² *Flint v. Travelers Ins. Co. (Tex. Civ. A.)*, 43 S. W. R. 1079.

³ *Ante*, § 329, *et seq.*

⁴ 120 U. S. 527; 7 S. C. R. 460.

⁵ *Life Ins. Co. v. Terry*, 15 Wall. 580; *Bigelow v. Berkshire Ins. Co.*,

assured hanged himself while insane, the court, repeating the words used by Mr. Justice Nelson, when chief justice of New York, said that 'self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose,' and was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force.'¹ In a like case, Vice-Chancellor Wood (since Lord Chancellor Hatherley) observed that the deceased was 'subject to that which is really just as much an accident as if he had fallen from the top of a house.'² And in another case Chief Justice Appleton said that 'the insane suicide no more dies by his own hand than the suicide by mistake or accident,' and that under such a policy, 'death by the hands of the insured, whether by accident, mistake or in a fit of insanity, is to be governed by one and the same rule.'³ Many of the cases cited for the plaintiff in error are inconsistent with the settled law of this court, as shown by the decisions above mentioned. In this state of the law there can be no doubt that the assured did not die 'by suicide,' within the meaning of this policy; and the same reasons are conclusive against holding that he died by 'self-inflicted injuries.' In self-killing 'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries;' for in either case it is not his act. Nor does the case come within the clause which provides that the insurance shall not extend to 'death or disability which may have been caused wholly or in part by bodily

93 U. S. 284; *Insurance Co. v. Rodel*, 95 U. S. 232; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121; 3 Sup. Ct. R. 99.

¹ *Manhattan L. Ins. Co. v. Broughton*, *supra*; also *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill. 73.

² *Horn v. Anglo-Australian, etc., Co.*, 30 Law J. (N. S.) Ch. 511; 7 Jur. (N. S.) 673.

³ *Estabrook v. Union Ins. Co.*, 54 Me. 224, 227, 229.

infirmities or disease.' If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured or anything but the act of hanging himself, could be held to be the cause of death.¹ But the words 'bodily infirmities or disease' do include insanity. Although, as suggested by Mr. Justice Hunt, in *Life Ins. Co. v. Terry*,² insanity or unsoundness of mind often, if not always, is accompanied by or results from disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase 'bodily infirmities or disease,' the word 'bodily' grammatically applies to 'disease' as well as 'infirmities;' and it cannot be so applied without disregarding the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them. The prefix of 'bodily' hardly affects the meaning of 'infirmities,' and it is difficult to conjecture any purpose in inserting it in this proviso other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend. In the argument for the plaintiff in error, some stress was laid on the fact that the concluding paragraph of the application differs in form of expression so as to include mental as well as bodily diseases. It is by no means clear that this is so; but if it were, it would not affect the case.

¹ *Scheffer v. Railroad Co.*, 105 U. S. 249, 252; *Trew v. Railway Passengers' Assur. Co.*, 5 Hurl. & N. 211, and 6 Hurl. & N. 839, 845; *Reynolds v. Accidental Ins. Co.*, 22 Law T. (N. S.) 820; *Winspear v. Accident Ins. Co.*, 42 Law T. (N. S.) 900; affirmed 6 Q. B. Div. 42; *Lawrence v. Accidental Ins. Co.*, 7 Q. B. Div. 216, 221; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 16 N. W. Rep. 47.

² 15 Wall. 580.

The whole application is not made a part of the contract and the only mention of it in the policy is in the opening words, 'in consideration of the warranties made in the application for this insurance.' This does not include all the statements in the application, but only those which are warranties. Some of them may be; others clearly are not. The statements as to the age, occupation, previous state of health, and present habits of the insured, and as to his other insurance, may be warranties on his part. Those as to the amount, terms, and payee of the policy applied for, certainly are not. The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law and cannot control the legal construction of the policy afterwards issued and accepted. The death of the assured not having been the effect of any cause specified in the proviso of the policy and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy, by which he is declared to be insured 'against bodily injuries effected through external, accidental and violent means.' This sentence does not, like the proviso, speak of what the injury is 'caused by,' but it looks only to the 'means' by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning was held to be in the cases of *Trew*, *Reynolds* and *Winspear* above cited. And according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.' And the same court has held,¹ that where the insured was found dead with a pistol-shot through his heart that the court did not err in instructing the jury that the law would

¹ *Travelers Ins. Co. v. McConkey*, 127 U. S. 661.

presume that the death was not caused by suicide, but would on the contrary presume that it was unintentional on the part of the insured. In a recent case,¹ the Supreme Court of Michigan exhaustively reviews the law on the subject of suicide, considered in relation to the language used in the policy, and says: "Every person is presumed sane, and the burden is upon the plaintiff in the case to show the insured insane at the time of the taking of his life. The jury must determine this question from the acts and conduct of the deceased, and this can only be gathered from witnesses who are cognizant of the facts. The learned counsel for the defendant, however, argues that, even if there was evidence to go to the jury on the question of insanity, and though the jury have found that the insured came to his death while insane, yet, it appearing that he came to his death by his own hand, it is not a bodily injury, effected through external, violent, and accidental means, within the meaning of the policy. Practically, all the cases agree in holding in the language of the Supreme Court of Massachusetts in *Cooper v. Insurance Co.*,² that there is no substantial difference of signification between the phrases, 'shall die by his own hand,' 'shall commit suicide' and 'shall die by suicide.' The rule of construction, though not always recognized by the cases, is that this condition, being in the nature of a penalty or forfeiture, must be strictly construed. In *Insurance Co. v. Moore*,³ Mr. Justice Campbell, speaking for the court, said: 'The condition which makes the policy void in case of such a death is in the nature of a penalty or forfeiture. * * * The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term 'suicide,' as if it means a wrongful act, or self-murder.

¹ *Blackstone v. Standard L. & Acc. Ins. Co.*, 74 Mich. 592; 42 N. W. R. 156; 3 L. R. A. 486.

² 102 Mass. 227.

³ 34 Mich. 41.

It has no such restricted meaning. It means self-killing, just as 'homicide' means killing any one else. But there may be excusable homicide as well as felonious; and suicide was only cognizable at law when the person was *felo de se* or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense the man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will.' Upon the question of voluntary suicide, intentionally committed by a sane man in the possession of his faculties, knowing how to adopt means to ends, and conscious of the immorality of the act, there is no difference of opinion; and all authorities agree that self-destruction is within the exemption; and all authorities likewise agree that an accidental death,—as by taking poison by mistake, or shooting one's self with a pistol, supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying,—is not within the exemption. But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon this two prominent and different doctrines have been maintained. On the one hand it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adoption of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exists to such an extent that he may not be able to appreciate the moral qualities of the act. On the other hand it is maintained that, however intelligently the act may be done, if at the time he will be overpowered by an uncontrollable impulse, or the party be unable to appreciate the moral character of the act, it is not within the meaning of the provision. The rule in England was laid down in 1843,

in *Borradaile v. Hunter*,¹ and has since been adhered to. In this case the words of the condition were that the policy should be void if the assured should 'die by his own hand.' He threw himself from Vauxhall bridge into the Thames and was drowned. The jury found that he voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held that the policy was void, the rule being laid down, in effect, that the moral condition of the mind was immaterial; and if, when the act was done, the insured knew that life would be thereby destroyed, and intended it to be so, the policy is violated under the condition, although the insured was insane at the time. In *Dean v. Insurance Co.*,² the Supreme Court of Massachusetts held substantially the doctrine as laid down in *Borradaile v. Hunter*, supra. In *Insurance Co. v. Graves*,³ the Supreme Court of Kentucky were divided upon the question of the soundness of *Borradaile v. Hunter*, but unanimously agreed that where the suicide was committed during an uncontrollable passion, caused by intoxication, the condition was broken, and the policy avoided. In a more recent case in Massachusetts⁴ the question came again before the court, and the ruling in *Dean v. Insurance Co.*, supra, was adhered to. The proviso in the policy is that it shall be void if the assured shall die by suicide. The plaintiff offered to prove that the assured at the time of committing the act of self-destruction was insane. The court said: 'In the present case there was no offer to prove madness of delirium, or that the act of self-destruction was not the

¹ 5 MAN. & G. 639.

² 4 Allen, 96.

³ 6 Bush, 268.

⁴ *Cooper v. Insurance Co.*, 102 Mass. 227.

result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act.' The earliest case in New York is that of *Breasted v. Trust Co.*¹ The policy was to become void if the assured died by his own hand. The insured came to his death by suicide by drowning himself in the Hudson river. Chief Justice Nelson, delivering the opinion of the court, said, speaking legally: 'Self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy than if his death had been occasioned by such means. Suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide, within the meaning of the law.'² This case was modified, if not overruled, by *Van Zandt v. Insurance Co.*,³ where it was held that, under a condition as above, the only exception to the condition is where the act is accidental or involuntary; that to take a case out of the proviso the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse, which he could not resist. It is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act. In the later case in New York it is held that the words, 'die by his own hand'

¹ 4 Hill, 73.

² Citing 4 Bl. Comm. 189; 1 Hale, P. C. 411, 412.

³ 55 N. Y. 168.

have reference to an intelligent voluntary act and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary.¹ The Supreme Court of Maine in *Easterbrook v. Insurance Co.*,² where the condition of the policy was that, if he should 'die by his own hand,' and the jury found 'that the self-destruction was the result of a blind and irresistible impulse over which the will had no control,' and that 'the self-destruction was not an act of volition,' approved *Breasted v. Trust Co.*, *supra*, holding that suicide, to avoid a policy of life insurance, must be a criminal act, — one done with an evil motive. The leading case upon the subject is that of *Insurance Co. v. Terry*,³ approving what had been known as the 'New York doctrine.' In this case the policy was to be void if, the insured should die by his own hand. Mr. Justice Hunt, after a full review of the cases, laid down the rule thus: 'If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable.' This rule has been approved

¹ *De Gogorza v. Ins. Co.*, 65 N. Y. 235; *Weed v. Insurance Co.*, 70 N. Y. 561; *Newton v. Insurance Co.*, 76 N. Y. 426.

² 54 Me. 224.

³ 15 Wall. 580.

by subsequent cases in that court.¹ The rule laid down in *Insurance Co. v. Terry*,² is substantially the same doctrine as stated by this court in *Insurance Co. v. Moore*. We think the reasonable rule is as stated by Mr. Justice Hunt in *Insurance Co. v. Terry*: 'If the assured, being in possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.' This doctrine is approved and followed in express terms or in substance, in other cases.³ The same doctrine in substance, is laid down in *Easterbrook v. Insurance Co.*,⁴ approving the principal cases. The effect of this doctrine is that, in order to work a forfeiture under such a policy on the ground of self-destruction, the assured must have had sufficient mental capacity not only to understand that the act will destroy his life, but also distinguish

¹ *Insurance Co. v. Rodel*, 95 U. S. 232; *Insurance Co. v. Broughton*, 109 U. S. 123; 3 Sup. Ct. Rep. 99, citing and approving the opinion of Chief Justice Nelson in *Breasted v. Trust Co.*, *supra*.

² 15 Wall. 580.

³ *Insurance Co. v. Rodel*, 95 U. S. 232; *Insurance Co. v. Broughton*, 109 U. S. 121; 3 Sup. Ct. Rep. 99; *Waters v. Insurance Co.*, 2 Fed. R. 892; *Moore v. Ins. Co.*, 3 Ins. Law J. 444 (U. S. C. C. E. D. Michigan); *Merritt v. Insurance Co.*, 55 Ga. 103; *Phillips v. Insurance Co.*, 26 La. Ann. 404; *Insurance Co. v. Moore*, 34 Mich. 41; *Schaffer v. Insurance Co.*, 25 Minn. 534; *Insurance Co. v. Groom*, 86 Pa. St. 92; *Hathaway's Admr. v. Insurance Co.*, 48 Vt. 335.

⁴ 54 Me. 224.

its moral quality and consequences,—the right and wrong of it; and must perform the act, not under any uncontrolled impulse resulting from insanity, but voluntarily, with the intent to end his life. In other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing American doctrine; and it seems to us to be the safer and more reasonable and more consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture, which is a favorite principle of an enlightened jurisprudence. Nor can it have any injurious effect, since insurers may always frame such contracts to suit themselves, and may, if they choose, insert express stipulation to the effect that insanity shall not in any case prevent an avoidance by the suicide of the assured. As is stated in a note to *Breasted v. Trust Co.*:¹ ‘If they prefer, for the purpose of getting custom, to omit such stipulations, and to leave the matter in doubt, the doubt ought to be resolved against them. If the assured is to take the sole risk of his becoming insane, and destroying his life, let him have notice of the fact by having it clearly ‘nominated in the bond.’ As has been well said in some of the cases referred to, insanity is as much a disease as fever or consumption; and upon principle there is no more reason why an insurance of one’s life should not be an insurance against death from the former disease than against death from the latter, if there is nothing to the contrary in the policy.’ Policies issued by some life insurance companies contain a condition or proviso that it shall be void if the assured shall die by suicide, felonious or otherwise, sane or insane; others provide, if the assured shall die by sui-

¹ 59 Am. Dec. 494.

cide, sane or insane; others provide for an avoidance, if the assured die by his own hand, sane or insane; while others provide for an avoidance if he shall die by his own act and intention, sane or insane. Such a condition, expressed in any of these forms, covers any case of voluntary self-destruction, and no kind or degree of insanity will prevent an avoidance; and the courts, not only in England, but in this country, have almost universally held that with such provisions in policies of life insurance the policies are void if the insured comes to his death by his own hand. Some of those cases are cited by the learned counsel for the defendant in his brief as having some bearing upon the question now in issue. We think they have no bearing upon the case where no such proviso is found in the policy. Defendant's counsel seem to rely to some extent upon the ruling of this court in *Streeter v. Society*,¹ as bearing upon the question whether the insured came to his death in this case by accidental injuries. The policy in this case contained a condition, if the assured shall within three years from the date of this policy die by his own hand, sane or insane, this policy shall become and be null and void. Within the three years from the date of the policy the insured died from the effects of a pistol-shot wound inflicted upon himself. The court followed the opinion of Mr. Justice Davis in *Bigelow v. Insurance Co.*² holding that no recovery could be had upon the policy, by reason of the limitation contained in the proviso, sane or insane. After quoting from the opinion of Mr. Justice Davis, it was said: 'If a person does an act in a state of unconsciousness, or involuntarily, whether he be sane or insane, such an act is nothing more nor less than accidental, and would not operate to forfeit the policy. The record

¹ 65 Mich. 199; 31 N. W. Rep. 779.

² 93 U. S. 284.

in this case does not disclose such a state of facts. There was no evidence that the act was involuntary, or that Mower was unconscious when he inflicted upon himself the fatal wound. The policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission.' Counsel for the defendant now insists that if the insured was insane his insanity caused his death, and that insanity is a disease, and that the question remaining, and upon which the court must pass is, is the death caused by the disease 'insanity' an accidental death? The policy provides 'that the insurance shall not extend to any bodily injury of which there shall be no external or visible sign, nor to any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease, nor to any one except when the injury is the proximate and sole cause of the disability or death.' Is insanity a disease? The learned Dr. Buckham, in his work on Insanity in its Medico-Legal Relations, published in 1883, at section 23 says: We think sufficient evidence has already been adduced to show that insanity is a physical, and not a mental disease. And yet the proof *par excellence* remains to be offered. We have taken considerable trouble to acquaint ourselves with the facts, and we believe that there is no alienist in the United States who believes that insanity is a disease of the mind. And the learned doctor offers the following as a definition of insanity: 'A diseased or disordered condition or malformation of the physical organs, through which the mind receives impressions, or manifests its operations, by which the will and judgment are impaired, and conduct rendered irrational.' And he says: 'As a corollary we offer: Insanity being the result of physical disease, it is a matter of fact to be determined by medical experts, and not

a matter of law to be decided by legal decisions and maxims. Agreeing, as we do, with the learned doctor, that insanity is a physical disease, and a question of fact for determination in the case, let us see what has been determined by the jury, before considering the proposition made by the counsel for defendant. The jury found — *First*, that the insured killed himself; *second*, that he did not know at the time that he was committing an act which must result in death; *third*, that he was not conscious of what he was doing; *fourth*, that he did not intend to cut his throat, and thereby kill himself; and, *fifth*, that at the time he did cut his throat he was insane. Admitting that there was some evidence to go to the jury upon those questions, and that those questions have been properly submitted to them by the court upon the trial, then we are asked to say that insanity being a disease, that disease was the proximate cause of the death of the insured, and that he did not come to his death by an external accidental injury, within the meaning of the terms of the policy. In *Insurance Co. v. Crandal*,¹ a policy similar in form and conditions was issued, based upon an application in substance the same as the one in issue here. Mr. Justice Gray, delivering the opinion of the court in that case, said: ‘The single question to be decided, therefore, is whether a policy of insurance against bodily injuries effected through external, accidental, and violent means and occasioning death, or complete disability to do business, and providing that this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries, covers a death by hanging one’s self while insane. The decisions upon the effect of a policy of life insurance which provides that it shall be void if the assured shall die by suicide, or shall die by his own hand, go far towards de-

¹ 120 U. S. 527; 7 Sup. Ct. Rep. 685.

termining this question. This court on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect.¹ In this state of the law there can be no doubt, says Justice Gray, that the assured did not die 'by suicide,' within the meaning of this policy; and the same reasons are conclusive against holding that he died by 'self-inflicted injuries.' If 'self-killing,' 'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries,' for in either case it is not his act. Nor does the case come within the clause which provides that the insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease.' If insanity could be considered as coming within this clause it would be doubtful, to say the least, whether under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death. * * * The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy by which he is declared to be insured

¹ Citing *Insurance Co. v. Terry*, 15 Wall. 580, and other cases in that court since that time.

‘against bodily injuries effected through external, accidental, and violent means.’ This sentence does not, like the proviso, speak of what the injury is ‘caused by,’ but it looks only to the ‘means’ by which it is effected. No one doubts that hanging is a violent means of death, as it affects the body from without. It is external, just as suffocation by drowning was held to be in the cases of *Trew*, *Reynolds*, and *Winspear*,¹ above cited. And according to the decisions as to suicide under policies of life insurance before referred to, it cannot when done by an insane person be held to be other than accidental.’ Counsel for defendant, considering this case of *Insurance Co. v. Crandal*, says, ‘that while the court held that insane self-destruction was an accidental death, and seemed to be of the opinion that insanity was a disease, there was no discussion by the court of the question whether insanity, being a disease, would not preclude insane self-destruction being an accidental death; that the court avoided the discussion of this question by suggesting that though they did not decide that, in accordance with the authorities already discussed, insanity was not the proximate cause of the death, and decided that the policy did not exempt the insurer from liability for a death of that character; that this was an evasion of the question squarely presented to the court for their consideration; that regardless of the exceptions in the policy, the company was clearly not liable, unless the death was accidental; and in deciding the case the court was bound to say either that death was not caused by the disease insanity, or that death so caused is accidental death.’ We think that the court in that case held that, while insanity was a disease, yet the insured,

¹ *Trew v. Assurance Co.*, 5 Hurl. & V. 211; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820; *Winspear v. Insurance Co.*, 42 Law T. (N. S.) 900; affirmed 6 Q. B. Div. 42.

having come to his death by hanging, though by his own hands, met with an accidental death within the terms of the policy. Counsel for defendant asks, what does 'external' mean? Can it be given any construction that will make it apply to violence done by the insured himself? Does it refer merely to the instrument of death? And says: 'I submit that external violence is that coming from sources outside of the insured. Blackstone's death came about through internal means; that it was caused by his own hand in a literal, if not in a legal sense; that his hand moved in obedience to his will, however darkened his will may be; that it was not voluntary; that he was not trying to do something else; therefore the injury was not external or accidental.' We do not agree with counsel in this proposition. We think the insured came to his death by violent, external, accidental injuries within the meaning of this policy. Without going over the reasons brought to bear upon the questions, it is evident that the words 'died by suicide,' 'death by his own hand,' and other words of similar import, are held to be made applicable only to that class of cases where the insured comes to the death by his own voluntary act. This question has been settled by the jury; that the deceased was insane; that he took his own life, that he did not intend in cutting his throat to kill himself; and that he was not conscious that his death would be occasioned thereby. Let us suppose, as an illustration, that A. and B. take a policy of like terms and conditions as the one in suit, based upon similar applications, with all the conditions and provisions contained in the present case, and during the lifetime of each of those policies A. becomes insane and while so insane, with a pistol, shoots and kills B. and in the same moment turns the pistol and kills himself. No one would question but that by the terms and conditions of B.'s policy he had met with an accidental, external and violent

death and the company would be held liable, that the case came within the provisions of the policy. Yet counsel for the defendant contends that, conceding that B. came to his death by accidental, external and violent injuries, because inflicted by the hand of another, yet A. although insane and wholly unconscious of the act of killing, not by force of his own will but because he was bereft of reason, kills himself, it is not an external injury and accidental death within the meaning of the policy. We think in a case of that kind A.'s death was as much an external, violent, accidental death as was the death of B. A. is no more responsible for the act than was B. It was involuntary, it was not the act of his own will; it was not his death by his own hand, in legal contemplation, but he came to his death at the hand of a madman though that madman was himself. We think that the defendant under the finding of the jury in this case cannot now be heard to say that this was not an accidental death, and an external injury coming within the terms of the policy. We find cases in which it is held under like policies, where one becoming insane and falling down upon a railroad track is thereby killed by the passing of a train that such cases come within the provisions of the policy and the company would be liable. It is also held, where one being insane, and through his insanity has placed himself in a dangerous position where he would not have been found had he been in his right mind, and had met with an accidental death by reason of his insanity, that the company is liable and recovery can be had. That where one in a fit of insanity involuntarily falls off a bridge and is killed, or falls into a stream and is drowned, this being involuntary, the company is liable. Yet counsel say that this class of cases are external injuries, injuries producing death of the insured from outside causes and for that reason the company may be held liable. We think where one is so far beside himself, his intellect

so darkened and obscured that he may be neither morally nor legally responsible for his own acts and conduct, and in such condition produces his own death, it cannot be any more said to be his act than though the act had been committed by another, or the insured had placed himself upon some dangerous height and fallen involuntarily and had been dashed to pieces.” And as held by the same court,¹ where the company is not to be liable if the insured comes to his death by suicide “sane or insane,” the policy does not cover death by suicide which is the result of insanity and it is itself an insane act unless the act is involuntary, or the assured is at the time unconscious.² If in any case a doubt exists whether the death of the insured was the result of accident or suicide the doubt should be solved in favor of the theory of accident and a condition in the policy that it shall be void if the insured shall die of suicide whether the act be voluntary or involuntary does not apply where the death is the result of accident.³ The mere fact of death in an unknown manner creates no presumption of suicide or the taking of one’s life by his own hand, and where the defense was of suicide it was held that the court rightfully instructed the jury that the presumption was that the death was not voluntary and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary.⁴ A nice question sometimes arises as to whether the death is the result of suicide or voluntary exposure to unnecessary

¹ *Streeter v. Western Union Mut. Acc. Soc.*, 65 Mich. 199.

² *Ante*, § 336.

³ *Keels v. Mut. Reserve Fund L. Assn.*, 29 Fed. R. 193. See also *Travellers Ins. Co. v. Melick*, 12 C. C. A. 544; 65 Fed. R. 178; 27 L. R. A. 329; where the insured cut his throat while in a spasm resulting from lockjaw.

⁴ *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221; 24 Atl. R. 992; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189; 15 South. R. 388.

danger. While, generally, the court will allow the jury to decide what the facts are it will not allow a verdict to stand where the evidence was manifestly one way.¹ And where a person killed himself while insane the court will not consider that the death was accidental because the insanity was produced by a fall received in an accident, the policy providing that the company should not be liable in case of a person dying by his own hand sane or insane.² Nor in such a contract will the court measure the degrees of insanity.³ It has been held that the Missouri statute, providing that suicide shall be no defense unless the insured contemplated suicide when the policy was taken out, applies to accident insurance policies.⁴

§ 497. **The Same Subject: Evidence in Cases of Suicide.** — Where the defense of suicide is set up the evidence of any fact which bears on the mental condition of the assured, or showing a motive, or want of motive, for the act, is on principle admissible. It is not competent, where the question is whether the death was accidental or the result of suicide, to show that the deceased was an infidel or an atheist for the purpose of arguing the probability of suicide.⁵ Nor is it a relevant fact that the deceased pointed out to his wife what property was his and what was not his property. Such acts having no necessary connection with suicide.⁶ Where poison is found in the stomach, in order

¹ *Williams v. U. S. Mut. Acc. Assn.*, 133 N. Y. 366; 31 N. E. R. 222; reversing 14 N. Y. Supp. 728.

² *Streeter v. Western Union Mut. Acc. Soc.*, 65 Mich. 199.

³ *Billings v. Accident Ins. Co.*, 64 Vt. 78; 24 Atl. R. 656.

⁴ *Logan v. Fidelity & Cas. Co.*, 146 Mo. 114; 47 S. W. R. 948. *Contra* is *Ticktin v. Fidelity & Cas. Co.*, 87 Fed. R. 543. It has been held also that a contract for a lesser amount in case of suicide is not in contravention of the Missouri statute. *Whitfield v. Aetna L. Ins. Co.*, 126 Fed. R. 269.

⁵ *Gibson v. American Mut. L. Ins. Co.*, 37 N. Y. 580.

⁶ *Continental L. Ins. Co. v. Delpeuch*, 82 Pa. St. 225.

to show suicide, it must not only appear that enough was taken to be dangerous but also that it was taken willfully and intentionally.¹ It is not competent to offer in evidence current rumors to show a motive unless such rumors were communicated to the assured in his lifetime.² And evidence of a prior accident, which is alleged to have produced insanity, is not enough to be considered as the producing cause of suicide;³ nor is the fact of suicide alone *prima facie* evidence of insanity.⁴ It has been held,⁵ that a photograph may be evidence of the physical condition of the assured, but this is in conflict with other authority.⁶ It is competent for ordinary persons to testify as to the conduct, manner and appearance of the insured, and the impressions thereby made upon them, as bearing upon the question of insanity.⁷ And so it was held,⁸ that the fact that the assured had, early in the morning without any apparent reason gone out of his bedroom and soon afterwards was found having fallen over the balustrade, and, later in the day, had complained of giddiness and headache and had been found, having fallen out of the window, his wife, who was present in the room, not being able to explain how he had fallen, was sufficient to justify the jury in finding in favor of suicide. And it is competent to show that the deceased, who had disappeared, had been laboring under a disease of the brain of a fatal character, which disease would probably render him insane, and also to offer evidence of the effect on the feelings of such a diseased

¹ *Edwards v. Travelers Ins. Co.*, 20 Fed. R. 661.

² *St. Louis Mut. L. Ins. v. Graves*, 6 Bush, 268.

³ *Streeter v. Western Union Mut. Acc. Assn.*, 65 Mich. 199.

⁴ *Weed v. Mut. Ben. L. Ins. Co.*, 70 N. Y. 561.

⁵ *Schafble v. Washington L. Ins. Co.*, 1 W. N. C. 369; 9 Philadelphia, 136.

⁶ *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306.

⁷ *Insurance Co. v. Rodel*, 95 U. S. 232.

⁸ *Stormont v. Waterloo L. & C. Assn. Co.*, 1 F. & F. 22.

condition of mind.¹ As we have seen,² where there is no evidence as to how a death was caused the presumption is that the death was accidental and not the result of suicide.

§ 498. **Injuries Received while Traveling or while a Passenger by a Public Conveyance.**—Often the policy contains a provision that it shall only cover injuries received while actually traveling in a public conveyance. In a recent case³ the question involved was whether the injury, which resulted in death, was received by the assured while traveling. In its charge to the jury the court discussed the principles involved at length, and we give the following extracts: “Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago, and proceeded to Kankakee, where the train arrived shortly after seven o’clock. It seems the practice was for the train to stop at the station, and then pass on to the coal bin, provided they took the entire train beyond Kankakee. Accordingly, on this evening, the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signaled with his light and the train went on to take in coal. There was a platform extending from the station-house alongside of the railroad track, toward the water tank and coal bin. When the train moved on, Tooley, who was standing by a door of the station-house, started forward on this platform to overtake the train. When he reached the train, he extended his hands to grasp the car rails, and fell between the two passenger cars,—the train consisting of an engine, tender, baggage car and two pas-

¹ *Jno. Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41.

² *Ante*, § 496; also *ante*, § 336a.

³ *Tooley v. Railway Passengers' Assn.*, 3 Biss. 399; Fed. Cases, No. 14,098.

senger cars. A car passed over him and he was killed. The first question is, what was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is, 'Provided, always, that the insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually traveling in a public conveyance, provided by common carriers for the transporting of passengers in the United States or the Dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection. These are the only conditions material to be considered in the examination of this case. Tooley must have been actually a traveler in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a measuring to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train as a traveler upon it. Secondly, and it is a question of fact to be determined by the jury, was Tooley, at the very time that the injury was received by him, a traveler on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defense that that was the termination of his journey; and if so, then he was not a traveler on this train at the time of the accident. I will call your attention to some of the facts having a bearing on this question. The conductor states, in his evidence, that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury, in order to determine whether or not

his journey extended beyond Kankakee — not conclusive, of course, because as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey, and various circumstances may happen during the progress of a journey which change the purpose of the traveler. He may start with the intention of only proceeding to a certain point. During the journey he may change his mind and proceed further on. There are many reasons, to which it is unnecessary to call your attention, which indicate that this is only one incident having a bearing upon the main fact of this part of the case whether or not his journey terminated at Kankakee. Mr. Merwin states in his evidence — the truth of which is a question for the jury — that, in a conversation he had with Tooley, he said that he intended or expected to go to Mattoon, which was south of Champaign, where the train stopped. The way that arose was this: it was in relation to the seats; he wanted two seats as he said so that he could sleep, as he thought, or expected, to go to Mattoon. Now as qualifying this, perhaps, and to some extent inconsistent with the statement of Merwin, is that of the conductor. The conductor says that twice, just before they arrived at Kankakee, he woke up Tooley, and told him that the next station was Kankakee; and there was no remark made by him intimating in any way that he intended to go further than Kankakee, and therefore it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question whether his journey terminated at Kankakee, and how far it may affect the statement of Merwin. There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. This is claimed to be conclusive evidence of his purpose to proceed further. It is for you to say what bearing that may have upon this particular question that we are now considering. Then, again, in

relation to whether or not he had any baggage with him. It is said there was a satchel or valise there, and that it was not found after his death. How far this may have any bearing upon the question is a matter to be determined by the jury. The only light in which it is material this question should be considered is, how far it may affect the conduct of Tooley on the general question of negligence. If his journey ceased at Kankakee then it cannot be claimed under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk. If he was going beyond Kankakee on the train then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee on the train, he had a right to leave the car at Kankakee and return to it; that is to say, he had the right to get off the train, he was not bound, in other words, to remain inside of the car all the time. There is, perhaps, one circumstance which I ought to refer to in connection with the question of the termination of the journey at Kankakee, and it is this: that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase a ticket before the train started on to obtain coal. Still, that of course, is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. It is only a circumstance to be taken into consideration by the jury. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with

all the rules which might be contained upon the time card. We must give this clause of the policy a reasonable construction. A policy was issued we suppose to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveler should only make himself acquainted with those general rules, as to the management of the trains, and the conduct of railroads which are presumed to be known to travelers under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged, because of this clause in the policy, to examine the time card and ascertain all the minutiae connected with the management of trains, but only such rules as a general traveler might be presumed to know and ought to know. Any other construction than this would operate as a snare upon travelers. To hold that the traveler must become acquainted with every minute rule which may be prescribed on the back of a time card we think cannot be said to be the true meaning of this clause of the policy. But perhaps if he did not know the time the train stopped at a particular place, there might be a question whether it was not his duty to make some inquiry of the employes of the train, the conductor or others." Where the injury was received in slipping off the step of a railway carriage while stepping out of it upon the arrival of the train at the destination of the assured, the company is liable.¹ In another case,² the assured, on landing at the steamboat wharf, started to walk on a short distance from the steamboat to the railroad for the purpose of further prosecuting her journey and, while walking, slipped and fell on the sidewalk, receiving injuries from which she died. There were carriages to transport the passengers but she

¹ *Theobald v. Railway Pas. Ass. Co.*, 10 Exch. 44; 26 Eng. L. & Eq. 432

² *Northrup v. Ry. Pass. Ass. Co.*, 43 N. Y. 516.

chose to walk. The defense was that the contract only covered risks "while traveling by public or private conveyances," and it was contended that a person's legs were not to be held to be within the meaning of the contract. It was held, however, that the risk covered the whole journey and that a person walking from the steamboat landing to the cars on a through trip was constructively traveling by public conveyance from one end of it to the other. But where the assured reached the railway station late at night and then started for a neighboring town on foot, but was murdered while on the journey, it was held that he could not recover.¹ And so where the assured left the train to take another one later and went forward to speak to the locomotive engineer about a matter not relating to the journey, and was injured crossing the platform of a car.² Where the risk is limited to that of passengers on the public conveyances of common carriers, the company is not liable where the assured fell from the hay-loft of a livery barn on a journey taking horses by railway to market, although the agent represented that it would cover all accidents happening to the assured during the journey as well as while on the cars.³ It has been held, however, that a provision in an accident insurance policy issued to and classifying insured as "a cattle dealer or broker visiting yards," restricting the insured to the occupancy of cars provided for passengers, is inoperative.⁴ In another much criticised case,⁵ the assured was a locomotive engineer and was killed while operating his locomotive. The company sold two classes of tickets, one was known as "travelers

¹ *Ripley v. Ry. Pass. Ass. Co.*, Fed. Cas. No. 11,854; 2 Big. Ins. Cas. 738; affirmed 16 Wall. 336.

² *Hendrick v. Employers Lib. Ass. Corp.*, 62 Fed. R. 893.

³ *Fidelity & Casualty Co. v. Teter*, 136 Ind. 672; 36 N. E. R. 283.

⁴ *Richards v. Travellers Ins. Co. (S. D.)*, 100 S. W. R. 428.

⁵ *Brown v. Ry. Pass. Ass. Co.*, 45 Mo. 221.

risk" and the other was "general accident" and was held at a higher price. The contract provided that death must be "caused by an accident while traveling by public or private conveyance provided for the transportation of passengers." It was contended that a locomotive was not a conveyance provided for the transportation of passengers, but the court held that the ticket did not apply solely and exclusively to passengers, but also to travelers, and, upon a construction of the contract, it was held that death was caused within the conditions of the policy so that the company was liable. A paymaster going from station to station in a special car is not a passenger, nor is a pay car a vehicle for the transportation of passengers.¹

§ 498a. Injuries Received while Entering or Leaving Moving Conveyance. — The contract often provides that the indemnity shall not apply when the injury is received in entering or leaving a moving conveyance or jumping off the cars. In construing a contract of this kind it has been held,² that the jumping on the cars is excused if the means of injury was not the result of design. It was held that the contract only made jumping on the cars a prohibited act when it was intended thereby to incur injury. Where the insured was injured while attempting to jump on a caboose the company under a condition of this kind was held not liable.³ So when the assured was injured by a sudden start just before he stepped on the step of the car.⁴ If the evidence is not clear as to how the injury

¹ *Travellers Ins. Co. v. Austin*, 116 Ga. 264; 42 S. E. R. 522; 59 L. R. A. 107, where a note is appended referring to cases defining who is a passenger.

² *Travelers' Preferred Acc. Assn v. Stone*, 50 Ill. App. 222. See also *Smith v. Aetna L. Ins. Co.*, 115 Ia. 217; 88 N. W. R. 932; 56 L. R. A. 271. See also *ante*, § 492.

³ *Huston v. Travellers' Ins. Co.*, 66 Ohio St., 246; 64 N. E. 123.

⁴ *Travellers' Ins. Co. v. Brookhover* (Ark.), 71 S. W. R. 246. See *Powis v. Ontario*, 1 Ont. L. R. 54.

occurred the question is for the jury.¹ If, however, the insured is injured while entering the car when not moving, by a sudden and unexpected moving of the train, the company is liable although the insured did not at once relax his hold on the railing but was carried for about two blocks before he fell.² A baggage checker is a railroad employe within the meaning of an exception which forbids the assured entering or leaving a moving conveyance, railroad employes excepted.³ In a contract where the condition was that the insurance should not cover when accident, death or injury resulted from "entering or trying to enter or leaving a moving steam vehicle (this clause does not affect railway employes)," the insured, a banker, was killed while attempting to get on a moving railway train: the court held,⁴ that the company was not liable and said: "The assured was not a railway conductor or employe, with the skill, judgment, and experience which one in that occupation may be presumed to have acquired and which might enable him to get upon a moving train with safety, when one unaccustomed to such things might incur great danger in doing so. The construction which the appellants would have us put upon this provision would render of no effect the more plain condition of this contract, that 'this insurance does not cover accident, nor death or injury resulting * * * from * * * entering, or trying to enter, or leaving a moving steam vehicle.' Only as to 'railway employes' is this condition inapplicable. The effect of this condition

¹ *Anthony v. Mercantile M. Acc. Assn.*, 162 Mass. 354; 26 L. R. A. 406; 38 N. E. R. 973; *Travellers Ins. Co. v. Snowden*, 45 Neb. 249; 63 N. W. R. 392. See as to exception of electric car, *King v. Traveller's Ins. Co.*, 81 Ga. 64; 28 S. E. R. 861.

² *Terwilliger v. National Masonic Acc. Assn.*, 197 Ill. 9; 63 N. E. R. 1034; *reversg.* 98 Ill. App. 237.

³ *Cotton v. Fidelity & Casualty Co.*, 41 Fed. R. 506.

⁴ *Miller v. Travelers' Ins. Co.*, 39 Minn. 548; 40 N. W. 839.

is to wholly exclude from the contract of insurance risks of that kind, except as to railroad employes. That risk the assured voluntarily subjected himself to, being still a banker, and attempting to get upon the train as a passenger. He was not a railway employe. Under this condition and upon the facts shown, there could be no recovery.” In a somewhat similar case,¹ the assured, a shop hand of a railway company, while being carried homeward from the shop at the close of the day’s work upon one of the company’s trains went out upon the platform, intending to get off, when the train should stop, for the purpose of crossing over by a switch to another track, and was thrown off and killed. In holding the company not liable the court said: “The case upon its face, conclusively shows that the conduct of the assured, to which the accident must be directly attributed, was such as, by the express and unambiguous terms of the contract, exempted the defendant from liability. The case is not controlled by the general principles of the law of negligence, but by the clear, express terms of the contract upon which the action is brought. The conduct of the deceased was within the agreement that, ‘standing, being or riding upon the platform of moving railway coaches * * * or entering, or attempting to enter or leave any public conveyance using steam as a motive power while the same is in motion * * * are hazards not contemplated or covered by this certificate and no sum shall be paid,’ etc. Whether the deceased went upon the platform with the intention of getting off at once, before the train should stop, or of remaining upon the platform until the train should stop, the case was unquestionably within the prescribed conditions which exempted the insurer from responsibility. It was a voluntary act not prompted by sudden emergency or necessity. It may

¹ Hull v. Equitable Acc. Assn., 41 Minn. 231; 42 N. W. R. 936.

be that the stop at the switch was to be for so short a time that the assured could not, while the train remained motionless, go out upon the platform and get off. However that may have been the contract did not allow him to do as he did at the risk of the insurer; and he should, if necessary, have remained on the train, until it came to the depot. The distinct terms of the contract cannot be made to yield, or cease to be operative, from considerations of mere convenience to the assured." But this opinion is somewhat in conflict with that of the principles laid down by the Supreme Court of Appeals of West Virginia,¹ where an employe, after he had quit work for the day, was killed on his way home in crossing the railway tracks. The court held that he was in the discharge of duty in the service of the railway company at the time although he had finished work for the day and was returning to his home, and said: "He is killed while performing the indispensable act of going from his work at the day's close to his home before yet he had gotten from the railroad tracks and from among the cars and out of the field of the transaction of the company's business. Was he not, while passing over the railroad tracks in going to and returning from his home in the course of his labors, as much in discharge of his duties and in the service of the company as when he had the tools with which he worked in his hands, for the purpose of the question in hand?"

§ 498b. Injuries Received While Violating a Rule of the Company. — In a recent case,² the court discussed the meaning of a provision in the contract, that the company would not be liable if the injury was received while violating "a rule of a corporation," and said: "As to the condition ex-

¹ *Kinney v. B. & O. Employees Relief Assn.*, 35 W. Va. 385; 14 S. E. R. 8.

² *Marx v. Travelers Ins. Co.*, 39 Fed. R. 321.

- emptying defendant from liability in case of death from violating a rule of a corporation it is said that deceased was forbidden to ride on the platform by a rule of the railroad company, which was inscribed on a metal plate on the door of the car. Whether this can be taken to be a rule of a corporation, or what shall be a rule of a railroad corporation within the meaning of the condition, is not very clear. By another condition some limitations are imposed upon policy-holders traveling by rail as follows: 'Entering or trying to enter or leave a moving conveyance using steam as a motive power; walking or being on a railway bridge or roadbed.' Having thus defined the acts which must be avoided by policy-holders in traveling on cars, I doubt very much whether another can be added under the general designation of a 'rule of a corporation.' If, however, it shall be conceded that the railroad company had at some time prior to the death of Marx adopted a rule forbidding passengers to ride on the platform of a car, and that such rule was within the general condition of the policy referring to rules of a corporation, it was not then of force. The testimony of the trainmen was to the effect that it was not at all observed. All passengers on the road who were so inclined, and often by the invitation of the trainmen, rode on the platform of the cars as freely and as commonly as elsewhere. Under such circumstances it cannot be said that there was any rule of the railroad company as to riding on the platform. The cases cited to show that the consent of a conductor of a train or others in authority shall not be effectual to set aside such a rule, in so far as it may affect the liability of the railroad company for any injuries received while in that position, are not controlling. An insurance company offering indemnity for injury or death in case of accident, as to its policy-holders, is not at all in the position of a carrier for hire to its passengers. The latter is engaged in a special service of peculiar danger, as

to which some rules of conduct on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the assured. Will any one say that on sea and land, at home and abroad, a policy-holder must constantly consider whether he is within all the rules of all the corporations, public and private, which he may in any way encounter? Whatever the answer may be to any such question, it is plain enough that a rule of a corporation, within the meaning of this policy, must be one which is known to the policy-holder, and of force at the time of the alleged violation." As a general rule injuries received while riding on the platform of a railway car are not covered by the policy.¹ The exception does not extend to a mere temporary occupation of the platform as where a passenger suddenly taken ill going out on the platform to vomit, after he had tried the closet door and found it locked.² Nor to a temporary being on the platform of a vestibuled car.³ A distinction is made in regard to a construction of the proviso, that the injury shall not be received while violating a rule of the company, between employes and passengers. Where the insured was a railway switchman and was killed while getting off of a moving engine, the court held,⁴ that the company was not liable, because the insured was not in the exercise of due care and diligence, because violating a rule

¹ *Aetna L. Ins. Co. v. Vandecar*, 30 C. C. A. 48; 86 Fed. R. 282; 57 U. S. App. 446; *Van Bokkelen v. Travellers Ins. Co.*, 34 App. Div. 399; 54 N. Y. Supp. 307; *affd.* 167 N. Y. 590; 60 N. E. R. 1121; *Sawtelle v. Ry. Pass. Ass. Co.*, 15 Blatchf. 216; Fed. Cas. 12,392.

² *Preferred Acc. Ins. Co. v. Muir* (C. C. A.), 126 Fed. R. 926.

³ *Standard L. & A. Ins. Co. v. Thornton*, 40 C. C. A. 564; 100 Fed. R. 582; 49 L. R. A. 116.

⁴ *Standard L. & Acc. Ins. Co. v. Jones*, 94 Ala. 434; 10 So. R. 530.

of the company. After referring to the doctrine of the courts of that State, that in actions by employes against railroad companies sounding in damages for personal injuries, the plaintiff is not chargeable with negligence upon the mere fact that his conduct at the time of the infliction of the injury and contributing to it was violative of a rule of the employer, unless knowledge of the rule is brought home to him, the court said: "This rule does not obtain between passengers and common carriers, because, in a measure, of the absence of this element of duty, and probably also of the impracticability of instructing each passenger as to the rules made for his observance while the relation exists; and the passenger must therefore acquaint himself with these rules and comply with them, or fail therein at his own peril. This principle, in our opinion, obtains between the insurer and the insured in a case like this, where the insurance is effected with reference to a particular employment, and the policy contains a stipulation that it shall not cover any injury resulting from the violation of the rules of the employer. The insurer can not know the rules which the employer has adopted for the government of the employe, — it may be, indeed, that the insurer does not know who the employer is, — and there can be no duty resting on the insurance company to instruct the insured as to the rules of the service in which he is engaged. On the other hand, it is not only entirely practicable for the employe to inform himself in this respect, but it is certainly, as between him and the insurer, his duty to do so. He undertakes to conform to rules made for his protection, the terms of which the insurer is not and cannot be advised of, but which he can and should acquaint himself with, as a condition to availing himself of the benefits of the policy, and he must be held to have discharged this duty, and to have informed himself of their existence and terms, so that when he is injured,

in consequence of conduct violative of an existing rule applicable to him and the service he is rendering, it is wholly immaterial whether, in point of fact, he knew of the rule or not." If the alleged violation of rules is crossing the tracks, it may be shown that there was a custom of crossing the tracks at the place where the injury occurred in order to reach the station.¹

§ 498c. **Injuries received while walking or being on a railway track or roadbed.** — Where the policy excepts the hazard "of standing or walking on the roadbed or bridge of any railway," this does not include the mere crossing of tracks. To stand or to walk on a roadbed implies some sensible duration of the act and does not describe the mere crossing made for justifiable purposes, such as reaching the station. Common language distinguishes between standing, walking and crossing.² Nor to being on the track at a public crossing.³ Nor, going on the track to board a train.⁴ But the insured is not exempted because his duties as coal salesman require him to go on railway tracks.⁵ The word, "roadbed," does not include the ends of ties of unusual length;⁶ nor a space of ten feet between the tracks.⁷ The condition is valid and it is immaterial that the place had been used as a pathway without objection from the railway company.⁸ Walking bet-

¹ *Duncan v. Preferred Mut. Acc. Assn.*, 13 N. Y. Supp. 620.

² *Duncan v. Preferred Mut. Assn.*, *supra*. See also *Metropolitan Acc. Assn. v. Taylor*, 71 Ill. App. 132.

³ *Traders, etc., Acc. Co. v. Wagley*, 20 C. C. A. 588; 74 Fed. R. 457; 45 U. S. App. 39.

⁴ *De Loy v. Travellers Ins. Co.*, 171 Pa. St. 1; 32 Atl. R. 1108.

⁵ *Yancy v. Aetna L. Ins. Co.*, 108 Ga. 349; 33 S. E. R. 979.

⁶ *Standard L. & A. Ass. Co. v. Langston*, 60 Ark. 381; 30 S. W. R. 427.

⁷ *Meadows v. Pacific Mut. L. Ins. Co.*, 129 Mo. 76; 31 S. W. R. 578.

⁸ *Weinschenk v. Aetna L. Ins. Co.*, 183 Mass. 312; 67 N. E. R. 242. See also *Pacific Mut. L. Ins. Co. v. Howell*, 13 Ind. App. 519; 41 N. E. R. 306; *Piper v. Mercantile M. Acc. Assn.*, 161 Mass. 589; 37 N. E. R. 759.

ween the tracks is being on the roadbed of a railway.¹ So also where it was provided by the contract that no claim should be made under the policy if the injury was received while "standing, riding or being upon the platform of moving railway coaches" and the insured met his death by falling from the platform of one of the cars of a railroad company while riding on the platform or while passing from one car to another, it was held that the clause of the policy included death while riding on the platform but not while passing from one car to another, and that passing from one car to another was exposure to unnecessary danger avoiding the insurance.² And where one, running rapidly toward an approaching train for the purpose of getting the mail bags, stumbled as he neared the track and fell against the engine, it was held,³ that the injury cannot be construed as the result of "walking or being on a railway track." So where the insured was traveling by rail and the train stopped on the bridge across the Ohio river by reason of the draw part of the bridge being open and he went to the front platform of the coach in which he was riding and stepped off and through a hole in the floor of the bridge, causing his death. This hole was about three feet wide and four feet long, caused by the removal of some planks during the making of repairs. It was held that this was not "walking or being on the roadbed or bridge of a railway,"⁴ the court said: "He certainly was not walking on the roadbed or bridge; and, strictly speaking, it is doubtful whether he was being on either. The evidence indicates that, without touching either, he probably passed directly from the steps of the car through the hole in the bridge. We will not, however,

¹ *Piper v. Mercantile Acc. Co.*, 161 Mass. 589; 37 N. E. R. 759.

² *Sawtelle v. Ry. Pass. Ass. Co.*, 15 Blatchf. Fed. Cas. No. 12,392.

³ *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201; 9 So. R. 869.

⁴ *Burkhard v. Travelers Ins. Co.*, 102 Pa. St. 262.

put the case on the narrow ground that he did not come in contact with either roadbed or bridge. The language of the exception clearly implies two thoughts: one, that the insured must not be on the roadbed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective roadbed or defective railway bridge, but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to railway bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collision with trains moving thereon. The present is not like a case between a passenger and a railway company, in which the company may be exempt from liability for damages arising from negligence of the passenger not voluntary.”

§ 499. **Unlawful Act—Violation of Law.**—We have already considered¹ the condition, contained in life insurance policies, that the company shall not be liable in case of death of the insured caused by an unlawful act, or if he shall die while engaged in violation of law. The same principles are applicable to accident insurance policies which are conditioned not to cover death or injuries received because of violation of law, or while engaged in an unlawful act. Where the policy contained a condition that the company would not be liable for a death by accident caused by violation of law it was held by the Supreme Court of the United States,² that a recovery can not be had; in a State where horse-racing is a misdemeanor, for a death by

¹ *Ante*, § 339.

² *Travelers Ins. Co. v. Seaver*, 19 Wall. 531.

accident which occurred to the insured while engaged in a horse-race. In this case the plaintiff's husband was killed suddenly immediately after jumping from a sulky in which he was driving in a match race on the event of which a considerable sum of money was wagered. The court says: "The company in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations. And in the class of cases under consideration we have no question that the sum of money often at stake stimulates to further acts of carelessness in the way of violence, fraud and a disregard of the rules of fair racing, which increase largely the dangers always attendant on that sport. The class of men who collect on such occasions, and who often become the leading parties in the conduct of the affair when large sums of money are wagered, have led to its denunciation by many wise and thoughtful people, and very surely adds to the risk of personal injury to the rider or driver. It was against this general species of danger attending nearly all infractions of the law, that the company sought to protect itself by the clause of the policy in question, and of this class was the reckless driving of Gilmore. If his intentions were as bad as the instructions imply, they did not take the case out of the protection of the clause. If Seaver had died the moment he was thrown from the sulky his death would have been caused by a violation of the law, though Gilmore may have disregarded the rules of the courts, and may have intentionally sought to run Seaver off the track." Where the statutes of the State forbade hunting on Sunday, or traveling on Sunday except from necessity or charity, and the insured was walking from one town to another on that day for the purpose of hunting, it was held,¹ that no recov-

¹ *Duran v. Standard L. & Acc. Ins. Co.*, 63 Vt. 437; 22 Atl. 530; 13 L. R. A. 637.

ery could be had for an injury occasioned by the insured slipping on frozen ground while returning home from hunting, the policy providing that it should not apply where a violation of law was the act, cause or condition producing the injury either wholly or in part. In this case the court says: "In going from Burlington to Colchester and back, a distance of 12 or 14 miles to visit Coates for pleasure, or to hunt, the plaintiff was clearly violating the provisions of R. L. Sec. 4315, prohibiting traveling on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps he slipped and was injured. We think it would savor too strongly of hair-splitting refinement to hold that the injury was not directly caused by the violation of the law in traveling. But, in this view of the case, the exception in the policy exempts the defendant from liability whether the traveling is held to be the cause, or only a condition, producing injury, or influencing it directly or indirectly. The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant had a right to say that it would not assume such increased risk." But the condition does not apply where the insured, after hunting on Sunday and while at a friend's house, was injured in slipping on the ice.¹ It does apply where the insured, after riding on a bicycle to a funeral on Sunday, took a circuitous route home for pleasure and was injured.² But one who has started to hunt prairie chickens during the closed season has not thereby violated the law.³ Nor one who is injured after leaving a

¹ *Prader v. National Mas. Acc. Assn.*, 95 Ia. 149; 63 N. W. R. 601.

² *Eaton v. Atlas Acc. Ins. Co.*, 89 Me. 570; 36 Atl. R. 1048.

³ *Cornwell v. Fraternal Acc. Assn.*, 6 N. D. 201; 69 N. W. R. 191; 40 L. R. A. 437.

bawdy house though carrying a concealed weapon.¹ The condition does not apply if the act did not increase the risk.² In another case,³ the policy stipulated that the insurance should not extend to injuries received while engaged in or in consequence of any unlawful act, and it was held that the fact that the assured was killed while living in a state of fornication with his mistress does not prevent a recovery, where it does not appear that the infliction of injury is a natural and necessary consequence of the unlawful association, as its probable and to be anticipated result. The court said: ‘If it were true that such association *per se* was an unlawful act, it would not follow that plaintiff could not recover. In order to defeat a recovery, because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the assured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted a violation of the law and the death of the insured.’⁴ Illustrating, it is aptly said in the same case: ‘Suppose a man violates the law against profanity and is shot while so doing, should that absolve the company from liability?’⁵ Numerous illustrations of similar character might be presented in which the act, however unlawful, has no relation to the death as its cause or contributory element, but they need not be multiplied.

¹ Jones v. U. S. Mut. Acc. Assn., 92 Ia. 652; 61 N. W. R. 485.

² Conboy v. Railway Officials, etc., Co. (Ind. App.), 43 N. E. R. 1017; Lehman v. Great Eastern, etc., Co., 7 App. Div. 424; 39 N. Y. Supp. 912.

³ Accident Ins. Co. v. Bennett, 90 Tenn. 256; 16 S. W. R. 728. See also Standard L. & A. Ins. Co. v. Fraser, 22 C. C. A. 499; 76 Fed. R. 705; 44 U. S. App. 694.

⁴ Bloom v. Insurance Co., 97 Ind. 478.

⁵ Bradley v. Insurance Co., 45 N. Y. 432; and Cluff v. Insurance Co., 13 Allen, 308.

There is no pretense that the death was caused directly by any such unlawful act of deceased, or resulted as a natural consequence thereof. Nor does it appear from the evidence that he was engaged in any act from which danger, much less death, might have been expected. The provision of the policy excluding liability for injury received by the insured while committing an unlawful act refers to such injuries as may happen as the necessary or natural consequences of the act—as its probable and to be anticipated consequences; and the reference to injuries received in consequence of any unlawful act is to those injuries which arise out of, or flow naturally from the act committed, as its effect or resulting consequence. Attempts to murder a particular individual, in which lawful resistance or consequent punishment may cause or occasion death; attempts to murder or injure or rob the wife or child or parent of another, in which injury might be expected from defense of that other; submitting to an operation for abortion; engaging in a horse-race where horse-racing is unlawful, and where the injury results during the race or in the effort to stop one of the horses in its progress; and the like are acts falling within terms of the policy, and illustrate what is meant by ‘injuries received while insured was engaged in or in consequence of an unlawful act.’¹ The law we hold is properly and well settled that such provision does not extend to exempt the insurer from liability because of the infraction by the insured of law when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy, not recognized or adopted as law. It has been held, too, that the unlawful act committed must be criminal and not a mere violation of a civil right or infraction of a law not

¹ *Cluff v. Ins. Co.*, 13 Allen, 308; *Hatch v. Ins. Co.*, 120 Mass. 550; *Bloom v. Ins. Co.*, 97 Ind. 478; *Insurance Co. v. Seaver*, 19 Wall. 531.

criminal.¹ The contrary has been held, so far as it relates to the violation of a positive rule of civil law which proximately leads to the injury, when it is such an act as increased the risk and naturally led to the death.² But how this is we need not decide. It is sufficient to say the act alleged does not fall within the terms of the policy, for reasons stated.”

§ 500. Employers Liability Insurance: Risks Covered. — It is quite common at the present time for policies to be issued insuring employers against liability on account of accidents to employes. These contracts are governed by the same principles and the same rules of construction apply as in other cases. It is a question of construction in each particular case what class of accidents or injuries are covered and no general rules can be laid down. Where the contract provided for insurance against injuries to any employe in the service of the insured while employed in any of the occupations, or any of the places, mentioned in the schedule attached, which schedule gave such occupations as “all operations connected with the business of ice dealers,” it was held³ that the company was not liable for losses paid the employes for injuries received while erecting a new ice house at the place stated in the application, although it was customary for ice dealers to erect their own ice houses. The court in this case held that evidence of the alleged custom was irrelevant and says: “The case depends upon the construction of the contract and the custom if proved would not enlarge the defendant’s liabil-

¹ *Adams v. Cowles*, 95 Mo. 506; 8 S. W. R. 711; *Cluff v. Ins. Co.*, 13 Allen, 308; *Bradley v. Ins. Co.*, 45 N. Y. 432.

² *Bloom v. Ins. Co.*, 97 Ind. 478. See also *Standard L. & A. Co. v. Fraser*, 22 C. C. A. 499; 76 Fed. R. 705; 44 U. S. App. 694.

³ *People’s Ice Co. v. Employers Liability Ins. Corp.*, 161 Mass. 122; 36 N. E. R. 754.

ty.” A case of the same kind was decided by the Supreme Court of Pennsylvania where the policy indemnified a horse car company for damages on account of injuries to persons, not employes, resulting from accident to, or caused by, horse cars, plants, works, machinery or appliances used in the business of the assured and described in the application. It was held¹ that such a contract does not insure against injuries caused by omnibus sleighs not described in the application, though customary in the neighborhood when the tracks are obstructed by snow and ice. In the case cited the court says: “ The policy, by its terms, was based upon statements made in the application, which were to be considered as warranties; and it was restricted to injuries caused by or to certain enumerated ways, means, and appliances used in the business, and described in the application. The defendants would not have been liable, under the terms of the policy, if the motive power had been changed by the use of steam or electricity, instead of horses; and we are not able to see that the result is different when one kind of vehicle is substituted for another. This is not the case of the temporary use of another means of transportation upon a part of the line, made necessary by reason of the accidental destruction of cars, tracks or bridges, nor of the use of plows or sweepers to clear the track; but it was an entire abandonment, during portions of the winter season, of the use of the road as a horse railroad, and the substitution of a distinct and different mode of transportation. Whether the risk would be increased or diminished would depend upon the circumstances of the particular case, but it is evident that the risk in the use of sleighs differs from the risk in the use of cars. It includes the danger of upsetting, the chances of collision

¹ *Pittsburg Horse Car Co. v. Fidelity & Casualty Co.* (Pa. St.), 28 Atl. R. 823.

with other vehicles, the liability to loss of control of the horses, — risks which are minimized in the use of street cars. The conditions from which accidents would probably result in the use of sleighs differ from those from which they are likely to happen in the use of cars; and, whether the difference is great or small, it is for the insurer to decide whether he will accept the risk.” Kidney disease contracted while assorting infected rags is an accident within the policy.¹ In a case in England,² the insurance was effected by a tramway company and the contract provided that the insurer should not be liable for an amount in excess of £250 in respect of any one accident. One of the cars of the assured was overturned and forty persons injured and plaintiff became liable to pay claims to the amount of £883, the court held that the liability was not limited to £250, but plaintiff was entitled to recover the full amount because the word accident meant injury in respect of which a person claimed compensation from the plaintiff.

§ 501. **Disability: Amount of Recovery.** — We have already considered ³ the subject of permanent or total disability and examined in that connection the various cases bearing upon the subject. It was there stated that what is a total disability depends upon the language used in the contract, which is far from uniform, and the questions arising are largely those of construction. In a recent case,⁴ it was held that a switchman on a railroad is disabled

¹ *Columbia, etc., Co. v. Fidelity & Cas. Co.* (Mo. App.), 78 S. W. R. 320.

² *South Staffordshire Tramway Co. v. Sickness & Accident Ass. Co.*, 12 Q. B. 402. As to notice see *Grand Rapids, etc. v. Fidelity & C. Co.*, 111 Mich. 148; 69 N. W. R. 249.

³ *Ante*, § 395a.

⁴ *Hutchinson v. Supreme Tent K. O. T. M.*, 68 Hun, 355; 22 N. Y. Supp. 801.

within the meaning of the contract, providing that he shall be entitled to certain benefits when he "becomes unable to direct or perform the kind of business or labor which he has always followed and by which alone he can thereafter earn a livelihood," when he suffers the loss of the fingers of one hand. In this case the court, in deciding that the plaintiff would not have been entitled to recover under the provisions of the original contract, briefly refers to the subject of total disability and says: "A total disability is ordinarily one of fact and is for the jury. It must be determined from the facts and circumstances disclosed in each case. That which would be a total disability in one case might not be in another. The loss of a hand by a lawyer might interfere but slightly in the transaction of his business, or in the performance of his work, while to a man who had learned a particular trade, by which he had always earned his living, and was entirely ignorant of all other trades or business, it might prove to be a much more serious disability. Ordinarily the loss of the fingers of the hand does not constitute total disability from the performance of 'any kind of labor or business.'"¹ In a case in California,² the assured was described as a "capitalist by occupation" and the policy provided for a certain payment in case of total "disablement from transacting every kind of business pertaining to his occupation." In holding that this means a disablement from transacting any business the court said: "The evidence upon this subject was all for the plaintiff, and proved, without conflict,

¹ The court cited *Knapp v. Association*, 53 Hun, 84; 6 N. Y. Supp. 57; *Saveland v. Fidelity & Casualty Co.*, 67 Wis. 174; 30 N. W. R. p. 237; *Lyon v. Assurance Co.*, 46 Iowa, 631; *Young v. Insurance Co.*, 80 Me. 244; 13 Atl. Rep. 896; *Sawyer v. Casualty Co.*, 1 Bigelow Cas. 289; *Hooper v. Insurance Co.*, 2 Bigelow Cas. 573; *Bac. Ben. Soc.*, § 295; *Cooke Life Ins.*, § 108; 4 Harv. Law Rev. 176.

² *Bean v. Travelers Ins. Co.*, 94 Cal. 581; 29 Pac. R. 1113.

that plaintiff was totally disabled from transacting any business. The whole must include the parts; therefore plaintiff was disabled from transacting any business as a capitalist. And upon this proposition it does not appear that at the trial there was any controversy. However instructed, therefore, the jury could not conclude otherwise than they did, and appellant is not injured. One of the grounds upon which the defendant moved for a new trial was that there was no evidence as to the value of plaintiff's time as a capitalist; and the statement shows that there was none, except upon the theory adopted by the court that the business of taking care of his orchard, buying and selling land, locating and surveying land, and superintending the development of water, being such occupations as a capitalist might reasonably be expected to follow, were occupations as a capitalist. There were other instructions which are duly excepted to by appellant, in which this idea is explained and insisted upon. The only objection to the testimony upon this subject was that it did not tend to find the value of plaintiff's services in the occupation of a capitalist. To the same effect is the specification of the insufficiency of the evidence. Was it essential in respect to this question, for the plaintiff to prove the value of his time in the occupation named? I do not find it so nominated in the bond. On the other hand, I find that he may recover \$50 per week, provided he shall recover no more than the money value of his time; not what his time was worth in the occupation named; nor do I think any such qualification was intended. It was merely that he could not make money by being hurt. Such a condition affords some security to the company against fraudulent claims, as much under the construction I have given it as the other. To simulate injury and refrain from work, cannot be made profitable. It could not have been supposed that the insured might not transact any business not included in his general occupa-

tion. That he might be injured while transacting other business is provided for in the policy; and he is not precluded from recovery thereby, but his insurance is calculated at a different rate. Any one rendered unable to transact business may suffer loss, and his time may be of value outside of his regular employment. As the insurance was meant to indemnify the insured for the loss of his time in consequence of his injury, there is no reason why it should not include this. Such construction seems to effectuate the presumed intent of both parties, and is in consonance with the language of the policy." Where the assured stated his occupation to be that of a "retired," the term, "gentleman," being evidently omitted by clerical error, and he was injured while operating a buzz saw at certain wagon shops in which he was interested, it was held,¹ that the injury was not covered by the policy as plaintiff was not totally disabled and prevented from any and all kind of business pertaining to his situation. In the contract in this case total disability was defined as follows: "Bodily injuries which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership." The court said: "Can it be said that a man with his hand in a sling, and suffering a degree of discomfort from a painful wound in that member, is wholly disabled and prevented from the prosecution of every kind of business pertaining to the condition of a retired gentleman? The question is one which does not seem to admit of much discussion, but it would be easy to suggest many duties, and even pleasures pertaining to the domestic, social and business relations of a retired gentleman from which he would not be wholly debarred by a disabled hand. He might

¹ *Knapp v. Preferred Mut. Acc. Assn.*, 53 Hun, 84; 6 N. Y. Supp. 57.

still, it would seem, keep an eye on his investments; collect and disburse or reinvest his income; attend the meetings of the boards of directors of which he was a member; superintend repairs and improvements to his property, and generally devote considerable attention to the care of himself, his family and his estate. That the plaintiff was totally disabled and prevented from any and every kind of business pertaining to the situation in life which he ascribes to himself seems not to be established by the evidence before us." And where the policy described plaintiff as by occupation "a leather cutter and merchant," and it was provided that the disability to be covered by the policy must totally disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, it was held that, in order to recover, plaintiff's disability must have been total not only to his business as leather cutter but also as to that of merchant.¹ So where the assured was a billiard saloon keeper and it was contended that he must have been disabled from doing any and every kind of act necessary to be done in the transaction of his business, it was held,² that the disablement must be one as to prevent the assured from doing any and every kind of business, not act, pertaining to his occupation. So where an attorney was so disabled that he could not use one of his hands but yet could attend to his business, it was held that he could not recover.³ In New York it was held,⁴ that where the assured was an ice man he could recover for total disability, although he was able to

¹ *Ford v. U. S. Mut. Acc. Relief Co.*, 148 Mass. 153; 19 N. E. R. 169.

² *Young v. Travelers Ins. Co.*, 80 Me. 244; 13 Atl. Rep. 896. See also *McMahon v. Order Chosen Friends*, 54 Mo. App. 468.

³ *U. S. Mut. Acc. Assn. v. Millard*, 43 Ill. App. 148; *Gracey v. People's Mut. Acc. Assn.*, 21 Pittsburg Leg. J. 25.

⁴ *Neafe v. Mfg. Acc. Indemnity Co.*, 55 Hun, 111; 8 N. Y. Supp. 202.

give general directions as to his business, but unable to deliver ice. And so, where the assured was a physician, he is entitled to pay as for total disability for a time when he was confined to his bed by an accident, though during that time he occasionally examined and prescribed for patients who came to his bedside, and reached for medicines for them without leaving his bed.¹ In this case the court says: "Total disability must of necessity to the case be a relative matter and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how a person who labors with his hands would be totally disabled only when he cannot labor at all, but the same rule would not apply to the case of a professional man whose duties require the activity of the brain and which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go about his business, enter his office and make calls upon any of his patients but is confined to his bed, as in this instance, and enabled only to exercise his mind on occasional applications to him for advice he may be said to be totally disabled within the meaning of the provisions of this policy." Generally speaking the total disability exists although the insured is able to do a few occasional acts but not any work connected with his occupation. As where a man visited his office without doing any work.² Or where he walked out for exercise and to visit the physician's office.³ Or a barber occasionally working but suffering constant pain.⁴ Or a merchant performing a trivial act connected

¹ *Wolcott v. U. S. L. & Acc. Assn.*, 55 Hun, 98; 8 N. Y. Supp. 262.

² *Thayer v. Standard L. & C. Co.*, 68 N. H. 577; 41 Atl. 182; *Turner v. Fidelity & C. Co.*, 112 Mich. 425; 70 N. W. R. 898; 38 L. R. A. 529 and note.

³ *Columbian, etc., Assn. v. Gross*, 25 Ind. App. 215; 57 N. E. R. 145; *Mut. Ben. Assn. v. Nan carrow* (Colo. App.), 71 Pac. R. 423.

⁴ *Hohn v. Interstate Cas. Co.*, 115 Mich. 79; 72 N. W. R. 1105.

with his business.¹ But mere indisposition is not total disability.² The company, however, is not liable when it is shown that thirty days elapsed from the time of the injury before the insured was disabled so that he could not attend to his business. The word, "immediate," used in a policy, is a word of time and not of cause and effect, and the time which it indicates is not the same as that which would be indicated by the phrase "reasonable time."³ The court says: "Where a man has received a blow on the head, which at the time of its infliction does not appear to be serious, and for a month goes on regularly, though with some inconvenience, attending to his business and then becomes unable for a long time to transact business at all, it is certainly not improbable, to say the least, that something else besides the original injury may either have caused or largely contributed to his condition." Where the contract provides for relief in case of accident resulting in total permanent or partial permanent disablement, and there is no provision for the payment of any benefits for an injury resulting in partial disablement unless it was also of a permanent character, the liability of a company is not enlarged so as to embrace cases of merely partial disablement of permanent character, by indorsement on the certificate to the effect that if a member shall sustain bodily injuries whether partial or totally disabling 'by means as provided for in this certificate,' the payment of the

¹ *Lobdill v. Laboring Men, etc., Assn.*, 69 Minn. 14; 71 N. W. R. 696; 38 L. R. A. 537.

² *Bylow v. Union Cas. Co.*, 72 Vt. 325; 47 Atl. R. 1066. See also *Gainor v. St. Lawrence, etc., Assn.*, 21 Misc. 27; 46 N. Y. Supp. 965; *McKinley v. Bankers, etc., Co. (Ia.)*, 75 N. W. R. 670; *Baldwin v. Fraternal Acc. Assn.*, 21 Misc. 124; 46 N. Y. Supp. 1016; *Shera v. Ocean Acc. Ins. Co.*, 32 Ont. 411. As to continuous disability, see *Pacific M. L. Ins. Co. v. Branham (Ind. App.)*, 70 N. E. R. 174.

³ *Williams v. Preferred Mut. Acc. Assn.*, 91 Ga. 698; 17 S. E. R. 982. See also *Merrill v. Travellers Ins. Co.*, 91 Wis. 329; 64 N. W. R. 1039.

weekly relief shall exonerate the company from all further liability, followed by a schedule designating different kinds of injuries with a specified period of relief for each and a statement that the injuries not included in the schedule will be adjusted on their merits.¹ Where the plaintiff was insured as a local fireman, the reference in the contract "to the loss of business time" has plain reference to the occupation of the insured, and the loss of time in such business means the loss of time in the business of a fireman, it has no reference to the whole range of business pursuits.² Where the contract provided that the company should not be liable to an amount in excess of £250 in "respect of any one accident" and was effected by a tramway company, and one of its cars was overturned injuring forty persons and the plaintiff became liable to pay claims to the amount of £833, it was held, construing this contract,³ that the word, "accident," in the policy meant injury in respect of which a person claimed compensation from the plaintiff and consequently the liability of the defendant was not limited to £250 but plaintiff was entitled to recover the full amount. Where the contract merely indemnified against loss of time in a certain sum per week during the period of disability the administrator of the assured cannot recover anything in case of accident causing

¹ *Hollobaugh v. Peoples Mut. Acc. Ins. Assn.*, 138 Pa. St. 595; 22 Atl. R. 29.

² *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Ia. 468; 52 N. W. Rep. 482. As to construction of particular contracts see *Ætna L. Ins. Co. v. Frierson*, 51 C. C. A. 424; 114 Fed. R. 56; *Hayes v. Continental Cas. Co.*, 116 Ga. 264; 42 S. E. R. 522; 59 L. R. A. 107; *Van Slooten v. Fidelity, etc., Co.*, 78 App. Div. 527; 79 N. Y. Supp. 608; *Howe v. Provident, etc., Soc.*, 7 Ind. App. 586; 34 N. E. R. 830; *Doody v. National Mas. Acc. Assn. (Neb.)*, 92 N. W. R. 613; 60 L. R. A. 424. As to construction of what is meant by "immediate" disability *Rorick v. Railway Officials, etc., Assn.*, 55 C. C. A. 369; 119 Fed. R. 63.

³ *South Staffordshire Tramways v. Sickness and Accident Ass. Assn.*, 12 Q. B. 402.

the accidental death of the assured.¹ In another case the provision of the policy was that "if the insured should sustain any bodily injury * * * which shall occasion permanent partial disability (as defined on the back hereof) then the company shall be liable to pay the sum of £200." On the back of the policy was the following: "permanent partial disablement implies loss of one hand, loss of one foot or complete or irrevocable loss of sight." The court held,² that the notice was ambiguous and must be read in the most favorable way for the insured and consequently he was entitled to recover the £200 for permanent partial disablement caused by hernia.

§ 502. **The Same Subject: Loss of Eyes or Limbs.**—Where the contract provides that the principal sum shall be paid if the assured shall, from the effects of injury caused by violent and accidental means which shall be "externally visible," "suffer the loss of the entire sight of both eyes or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot," it was held that the insured could recover where he had been accidentally shot in the back, producing total paralysis of the lower part of the body and entirely destroying the use of both feet.³ In the case cited the court says: "It is almost superfluous to say that the construction of a policy of life or accident insurance is governed by the same rules as those which are applicable to the construction of other written contracts; that is, they should be construed according to the sense and meaning of the language used in order

¹ Dawson v. Acc. Ins. Co., 38 Mo. App. 355.

² Scott v. Scottish Acc. Ins. Co., 26 Scott. L. R. 475.

³ Sheanon v. Pacific Mut. L. Ins. Co., 77 Wis. 618; 46 N. W. R. 799; 9 L. R. A. 685. For construction of a peculiar contract as to loss of both feet, see Marshall v. Commercial Travelers, etc., Assn., 170 N. Y. 434; 63 N. E. R. 446; reversg. 68 N. Y. Supp. 1143.

to carry out the intention of the parties to the contract when ascertained. And it is doubtless true that, in arriving at the intention of the parties, the language is to be understood in its ordinary and popular sense, unless it appears that it was used in some special or peculiar sense. There can be no disagreement as to the application of these cardinal and familiar rules in the construction of such contracts as the one before us. Now, in view of these rules, what conclusion must be reached upon the facts stated in the complaint? It appears that the plaintiff was shot in the back, during the life of the policy, while he was attempting to escape from a saloon quarrel, commenced by other parties; and the ball penetrated his spine, and produced an immediate and total paralysis of the lower part of his body, and entirely destroyed the use of both feet. The quarrel in the saloon arose suddenly and was carried on without any participation therein by the plaintiff, and without his fault. He happened to be in the saloon when it occurred, and seems to have used due caution for his personal safety and protection; but he was shot in the back, probably accidentally, by one of the parties engaged in the quarrel. The question is, does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury, which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot." This is the language of the policy, and the question is, what does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet so that they will perform no function whatever? The

contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation, or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word 'loss,' when used in such connection. Now if the feet and hands cannot be used for the purpose of moving about or walking or for holding or handling things, they are in fact lost, as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of these members; and, if the lower portions of the plaintiff's body and his feet are completely paralyzed and he is permanently and forever deprived of their use he has suffered 'a loss of two entire feet' within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body. It is not necessary to go into any recondite or elaborate discussion of the language of the policy, but only to give its ordinary and popular sense." But in a somewhat similar case the Supreme Court of Pennsylvania arrived at a different conclusion, holding,¹

¹ *Stever v. People's Mut. Acc. Ins. Co.*, 150 Pa. St. 132; 24 Atl. R. 662; 16 L. R. A. 416.

that one could not recover for the loss of a foot, where by reason of an injury to his back, he is deprived of the use of his leg, except when wearing an artificial support for his body, the court saying: "It will be perceived, therefore, that the policy in suit insured only against involuntary, external, violent and accidental injuries and not against disease of any kind, nor against disabilities which are the result wholly or in part, of disease or bodily infirmities; and for the purposes of the present case, the only injury for which there can be any recovery, within the terms of the policy, is the loss of one foot. Now, in point of fact, as has been already stated, the plaintiff has not lost a foot. So far as the evidence goes, both his feet are in perfect natural condition. His left foot is the only one in question, and in reality it has received no injury of any kind, external or internal. So far as all its physical functions are concerned, as a member of his body, it is entirely capable of use, if the other parts of his body which can or may affect its use are in proper condition. It is not proved, or even alleged, that any of the muscles, tendons or nerves of the foot are injured in any manner. The source of the difficulty does not lie in the foot nor in the leg. It is in another part of the body, to wit, the back. Just what the actual physical injury or difficulty was is not precisely stated in the medical testimony. It is uncertain. It is supposed to be some injury to a muscle or ligament, or nerve, or nerve center, or to be the vertebrae of the spinal column. The physicians have different theories regarding this subject and none of them claims to know with certainty. The disability of the plaintiff did not result immediately after the injury. He went to Philadelphia the day after, and remained several days; was examined and treated by physicians, returned home and on Monday following the previous Tuesday on which the accident happened, he became disabled while returning from his stable.

Whether the disability thus arising was due solely to the injury received at the time of the accident or partly to a diseased condition of the muscles, tendons, nerves, or spinal vertebrae might be an interesting and possibly a controlling question, but in the view we take of the case it is not necessary to determine that question. In point of fact the plaintiff was so much benefited by the treatment he received that he was able in December following and from thence until the trial, to use both his feet, to walk about and attend to his business, to ride in wagons and on cars and generally to go around his house and the town as he was accustomed to do before he was injured. It is only when he removes the mechanical appliance called a 'plaster jacket' that he becomes disabled. In such circumstances we do not see how he can be considered to have suffered the loss of a foot. He has neither lost a foot nor the use of it. He has it, and he constantly uses it, and therefore it cannot be said that because he is deprived of its use he is entitled to be considered as having lost the foot itself. If he had suffered an attack of permanent paralysis in the leg, and been thus deprived of the use of his foot, he could not have recovered, as the cause of his disability would have been disease. If, when he removes the jacket, a paralytic condition ensues, is it not due to a diseased condition of the nerves of the back, and does that help his legal standing under the fifth clause of the conditions of the policy? We think not; but aside from that, he has received surgical treatment for his injury which has been successful and has enabled him to preserve the use of his foot and the position is not tenable that he has lost his foot, within the meaning of the policy, because he has lost its use. Of course if the foot had been cut off by the accident or by amputation and he had been provided with an artificial substitute, which he could use, he could recover; but that would be because he had literally brought himself within the terms of the policy

by actually losing his foot. But where, as here, he has not lost his foot, and it has not even been injured and he is enabled to use it constantly by means of an appliance which prevents an injury in another part of his body from affecting the use of the foot, we are quite clear that there can be no recovery under the contract of the parties as for the loss of a foot.” The amputation of about one-fourth of the foot is not the loss of one foot.¹ A member of an association may recover for the loss of a hand if it is injured so as to be useless to him.² It has also been held that the loss of the hand above the knuckles is the loss of “one entire hand.”³ The question has also been held one for the jury.⁴ The loss of an arm above the elbow is the loss of an arm.⁵ Where at the time of the injury, the insured signed a receipt for the weekly indemnity and executed a release to the defendant from further liability the assured was allowed to recover as for total disability, considering the physical condition and mental state of the assured at the time the release was executed, but the amount received on account of weekly indemnity was credited on the larger sum.⁶ An interesting case was decided by the Supreme Court of Pennsylvania where the whole of the principal sum named in the contract was payable in the

¹ *Fuller v. Locomotive, etc., Assn.*, 122 Mich. 548; 81 N. W. R. 326; 48 L. R. A. 86.

² *Sisson v. Supreme Court of Honor (Mo. App.)*, 78 S. W. R. 297. See also *Gentry v. Standard, etc., Co.*, 6 Ohio Dec. 114.

³ *Sneck v. Travellers Ins. Co.*, 88 Hun, 94; 34 N. Y. Supp. 545; reversg. 81 Hun, 331; 30 N. Y. Supp. 881.

⁴ *Lord v. American Mut. Acc. Assn.*, 89 Wis. 19; 61 N. W. R. 293; 26 L. R. A. 741.

⁵ *Garcelon v. Commercial, etc., Assn. (Mass.)*, 67 N. E. R. 868.

⁶ *Sheanon v. Pacific Mut. L. Ins. Co.*, 83 Wis. 507; 53 N. W. R. 878. In this case a number of authorities are cited on the question of release or compromise being held inoperative because it was not signed by the party with full knowledge of its contents or with the intention to sign such a document.

event of "the total and permanent loss of the sight of both eyes." Before the time of making the contract the insured had lost the sight of one eye which was known to the general agent of the company, subsequently he sustained the loss of the remaining eye. In holding the company liable for the entire amount the court said:¹ "It is evident the plaintiff was seeking insurance against the total and permanent loss of his sight. The company insured him against that, or it did not insure him at all, which is not to be considered. There appears to have been no fraud or concealment practiced by the plaintiff upon the company, and we are not willing to believe that the latter took his premium without giving any insurance as regards his eyesight. The loss of one eye to him was precisely the same as the loss of both eyes by an ordinary man. It is total blindness in either case. There is no provision in the policy for the loss of one eye, as there is for the loss of one arm, or one leg. The reason is plain. The loss of one eye does not produce a 'total and permanent loss of sight.' For all practical purposes a man with one eye can still follow his occupation and gain his living, while the loss of an arm or leg is a disability which seriously interferes with his ability to earn his bread; hence it was that the policy provided or rather defined, the 'loss of sight' as the 'loss of both eyes.' It was the loss of sight which was insured against, and this was just as complete in the plaintiff's case as though both eyes had been lost during the life of the policy. Assuming that the company intended to insure the plaintiff against something, and that that something was the loss of his sight, the most that can be said is that having but one eye the risk was increased; but the risk was not increased after the policy was issued. The general

¹ *Humphreys v. National Ben. Assn.*, 139 Pa. St. 214; 20 Atl. R. 1047. And a precisely similar case is *Bawden v. London, etc., Ass. Co.*, 2 Q. B. 534.

agent knew precisely what the risk was when he took it, and neither he nor the company can be now heard to aver that the risk was greater in the case of a man with one eye than of one with two.¹ There can be no reasonable doubt that the plaintiff paid his premium and accepted the policy, under the belief that the words 'total and permanent loss of the sight of both eyes' were equivalent to the loss of eye-sight. He had a right to assume this in view of the fact that the policy was issued to him with knowledge on the part of the general agent that he had but one eye. A contract of insurance must have a reasonable interpretation, such as probably was in the contemplation of the parties when it was made.² Is it reasonable that the parties did not intend the policy to cover the matter of eye-sight at all? Yet this is the conclusion we must come to, if we sustain the defendant's contention. Where the terms of a policy are susceptible, without violence, of two interpretations, that construction which is most favorable to the insured, in order to indemnify him against loss sustained, should be adopted.' And the loss of one eye may amount to a total disability³ under the terms of the contract.

§ 503. **Commencement and Duration of Risk.** — Where the policy provides that no insurance shall be effected until the premium be paid, the company is not liable for an accident that occurs before the policy has been issued, or the premium paid, although the contract provides that it shall be in force from the day on which the accident occurred, such accident occurring in fact prior to the issue of the policy and payment therefor, though on the day of the date of the policy.⁴ A provision in a policy that the com-

¹ Insurance Co. v. Spencer, 53 Pa. St. 353.

² Grandin v. Insurance Co., 107 Pa. St. 26.

³ Maynard v. Locomotive, etc., Assn., 16 Utah, 145; 51 Pac. R. 259.

⁴ The Sickness & Acc. Ass. Assn. v. General Acc. Ass. Corporation, 29 Scott. L. Rep. 836. See also *ante*, 266, *et seq.*

pany shall not be liable in case of death from accident unless such death occur within a specified time from the accident will be sustained.¹ It often occurs that a receipt is given for the amount received in payment for indemnity for an accident and the question arises afterwards, when a second accident has occurred, whether the policy was in force at the time of such second accident? Where the amount due upon the happening of an accident was paid, and a receipt was given for the amount containing the words: "Under my policy No. 12,157 which is hereby surrendered," it was held that there was no consideration for the words: "hereby surrendered," and as an agreement they were inoperative and void, being without consideration and, it appearing from the evidence that the inference was warranted that the amount was paid only in satisfaction of the first injury, the policy itself not being surrendered, the company was held liable for the amount of the policy, the death of the assured occurring from the effects of the second accident, a few days later.² In another case it was held, under somewhat similar circumstances, that the payment for the first accident was made by mistake, the assured really not having been entitled to it because of non-payment of premium, and the assured losing his life by a second accident a short time afterward the company was exonerated.³ A failure to cancel a policy and return the order given on a railroad company by the insured for the payment of the premium will not amount to a waiver of the defendant's right to insist upon the forfeiture of the policy, and, the

¹ *Brown v. U. S. Casualty Co.*, 95 Fed. R. 935. See also *Rorick v. Railway Officials, etc.*, Assn., 55 C. C. A. 369; 119 Fed. R. 63.

² *Martin v. Manufacturers Acc. Indemnity Co.*, 60 Hun, 535; 15 N. Y. Supp. 309. See also *Wood v. Mass. M. A. Assn.*, 174 Mass. 217; 54 N. E. R. 541.

³ *Melin v. Accident Ins. Co.*, 70 Wis. 579; 36 N. W. R. 258.

assured having directed the cancellation of the policy and drawn the wages intended to be applied for the payment of the premium, the company in such a case was held not liable.¹ A policy purporting to insure against accidents for a period of twelve months from November 24th, covers an accident occurring on that day.²

§ 504. **Payment of Premium.** — The general rules applicable to the payment of premium in general also govern in accident insurance contracts and they having been already considered it is unnecessary to refer to them again.³ It is the general custom of companies insuring railroad employes to take an order on the company to pay the premium on such insurance and deduct it from the wages due such employe. As a general rule, the assured is entitled to notice of non-payment of any order given to pay such premium before forfeiture can be declared.⁴ As for example where an ignorant negro employed on a railroad gave an order for the premium due upon the accident insurance policy, and the order was sent to the railroad company, but a short time afterwards was returned unpaid with the information that the assured had left the service and nothing was due him, but no notice of non-payment was ever given such assured or further effort made to collect the premium, it was held,⁵ that the assured was entitled to notice of non-payment of the order and that the company was liable for an accident occurring to the assured thirteen days after the order had been returned by the railroad company unpaid. But where the assured,

¹ *McMahon v. Travelers Ins. Co.*, 77 Ia. 229; 42 N. W. 179.

² *South Staffordshire Tramways Co. v. Sickness, etc., Assn.*, 1 Q. B. 402; 63 L. T. 807.

³ *Ante*, § 350, *et seq.*

⁴ *Ante*, § 369; *Eury v. Standard L. & Acc. Co.*, 89 Tenn. 477; 14 S. W. R. 929.

⁵ *Eury v. Standard L. & Acc.*, *supra*.

who had given an order on his employer for the payment of the premium, left the service of the company and directed the cancellation of the policy and drew the wages intended to be applied in payment of the premium and knew that the order was unpaid, notice to him of the failure of the company to pay was held to be not required and the company was relieved from payment on account of the non-payment of the premium.¹ Where the company failed to present an order for the payment of the premium, given by the assured on the company, until after his death although several months had intervened, it will be estopped from setting up the defense of non-payment of premium.² The company may be estopped because of the language of the policy, to deny that the premium has been paid. As where the policy contained a clause making it incontestable "except for fraud or misrepresentation in the application," etc., and was delivered to the beneficiary. The premium was paid by an order of the insured on his employer, which he afterwards ordered not to be paid. He was soon afterwards killed, the court in passing on this clause in the contract said: ³ "The language of the application and of the policy, declaring that the policy shall be incontestable except for fraud, is unusually strong and clear. It is declared that if a binding receipt is issued and its number inserted in the policy, the policy 'shall be incontestable.' It seems clear that, having made this express and strong statement, the association cannot be allowed to affirm as against the beneficiary, however it may be as to the assured that the conditions precedent to the validity of the policy were not performed. The case of *Wood v. Dwaris*,⁴ is a much stronger one in favor of the

¹ *McMahon v. Travelers' Ins. Co.*, 77 Ia. 229; 42 N. W. R. 179.

² *Cotton v. Fidelity & Casualty Co.*, 41 Fed. R. 506. See also *Travelers' Ins. Co. v. Jones* (Tex. Civ. A.), 73 S. W. R. 978.

³ *Kline v. National Ben. Assn.*, 111 Ind. 462; 11 N. E. R. 620.

⁴ 11 Exch. 493.

insurer than the present. In that case the policy itself contained an express stipulation that if any untrue statements were made, it should be void; but in a prospectus issued by the company it was provided that all policies should be indisputable, except in case of fraud, and it was held that notwithstanding the provision in the policy, the insurer could only avoid the policy for fraud. In the course of the opinion delivered in that case, Baron Alderson said: 'When the plaintiff went to their office the defendants professed to grant him an assurance on those terms. Therefore they cannot now set up as a defense that the statement in the proposal was untrue, unless they add that it was fraudulently untrue for they have in fact said that they will never make any other defense.' This case was approved in *Wright v. Mutual Ben., etc., Co.*¹ In *Wheelton v. Hardisty*,² it was said by Lord Campbell: 'According to the case of *Wood v. Dwarries*,³ the equitable replication would be sufficient without the special fraud thus imputable to the fourth plea and we ought to be bound by that decision, even if we doubted the propriety of it, but I must say that I heartily concur in it.' There are other cases which recognize the general principle which applies here.⁴ Whether the assured could have availed himself of the benefit of that part of the policy which stipulates for the payment to him of weekly benefits in case of an accidental injury, we need not decide; for here the claim is made by the beneficiary to whom the association agreed to pay \$1,000 in the event of the death of the assured. The beneficiary took an im-

¹ 43 Hun, 61; 35 Alb. Law J. 323.

² 8 El. & Bl. 232, p. 276.

³ 11 Exch. 493.

⁴ *Wontner v. Shairp*, 4 Man. G. & S. 408; *Watson v. Earl of Charlemont*, 12 Adol. & E. (N. s.) 863; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Steele v. St. Louis, etc., Co.*, 3 Mo. App. 207.

mediate interest in the policy and her rights could not be impaired by any act of the assured performed subsequent to the execution of the policy; for the contract is that of an ordinary insurance company and not that of a benevolent organization.¹ The act of Kline in securing a refusal to pay the orders might perhaps have precluded him from recovering under the policy,² but it cannot prejudice the rights of the appellant. The case, therefore, is not affected by the wrongful act of the assured, in securing the refusal to pay his orders but it is to be determined upon the legal effect of the original contract between the insurer and the assured. There is a valid reason for making a distinction between the rights of the assured and the beneficiary in such a case as the present. Here the application indorsed on the policy provides that the 'binding receipt' when its number is inserted in the policy 'shall be conclusive evidence that the above amount has been paid' and the policy itself declares that it shall be incontestable except for fraud; and when these instruments are placed in the hands of the beneficiary, as in this case, the insurer ought, on plain principles of justice, be estopped to assert that the premium due under the provisions of the policy had not been paid. It is difficult to perceive how stronger representations could be made; and to permit the insurer to avoid them would, in many cases, be unjust for it might well be that the beneficiary, if not misled, would pay the premium. Some of the authorities go so far as to hold that upon grounds of public policy an insurance company will be held estopped to deny as against its acknowledgment, that the consideration for the policy has been paid.² If, however, under the contract no notice of the non-pay-

¹ *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Damron v. Pennsylvania, etc., Co.*, 99 Ind. 478; *Harley v. Heist*, 86 Ind. 196; *Wilburn v. Wilburn*, 83 Ind. 55; *Pence v. Makepeace*, 65 Ind. 345.

² *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384.

ment of the order need be given, such a stipulation will be enforced and the mere giving of an order will not amount to payment unless such order is in fact paid and no notice of non-payment is required.¹ If the insured leaves the money to pay the order in the hands of the paymaster the insurance company is not relieved because the paymaster fails to turn the money over.² And where the company retains an assessment out of the pay of a member who had made no formal application as required by the laws it was held that the application was waived.³ Where the insured has not used due diligence in an effort to pay the premium, having requested the solicitor of the company to pay for him instead of paying himself to the solicitor, the policy will be held void because of the non-payment of the premium, although under other circumstances it would have been held in force although the time for the payment of the premium had expired, credit having been given for the premium by the general agent.⁴ Where the insurance against accident is on the assessment plan, the general rules applicable to the levy of assessments, notices thereof, and the time within which they must be paid, are the same as in other cases.⁵ Thus, where the certificate provided that one month should be allowed for paying assessments

¹ *York v. Railway Officials, etc., Assn.*, 51 W. Va. 38; 41 S. E. R. 227. For a somewhat differing construction of the usual stipulation in railway employe's accident insurance policies where payment of premium is made by orders on the company, see *Pritchett v. Continental Casualty Co. (Ky.)*, 80 S. W. R. 181, where the company was held liable, and *Reed v. Travellers Ins. Co.*, 117 Ga. 116; 43 S. E. R. 433, where the opposite conclusion was reached.

² *Fidelity & Cas. Co. v. Johnson*, 72 Miss. 333. 17 Sou. R. 2; 30 L. R. A. 206; *Pacific M. L. Ins. Co. v. Walker*, 67 Ark. 147; 53 S. R. W. 675. See also *Travelers Ins. Co. v. Cash*, 14 Ind. App. 3; 42 N. E. R. 246.

³ *Burlington, etc., Assn. v. White*, 41 Neb. 547; 59 N. W. R. 747.

⁴ *Cronkhite v. Accident Ins. Co.*, 17 Ins. L. J. 509.

⁵ *Ante*, § 377.

after notice thereof, and on the envelope containing the certificate was indorsed "first assessment payable February 1st," it was held,¹ that the failure to pay before February 1st, an assessment made January 1st, of which the assured had received no notice, did not forfeit the certificate. A notice requiring payment of an assessment in twenty-eight days, the by-laws requiring thirty, is void.² And where the application stated that the assured would be entitled to no benefits "until after the receipt and acceptance of the application and membership fee and amount of one assessment by the secretary or treasurer in New York," and the policy provided that \$5 should be paid on delivery thereof, and the further sum of \$2 assessment should be paid too without specifying when, it was held³ that the policy took effect when it was delivered, and the \$5 fee paid. Under the statute of a State defining insurance agents the company may become liable, because of the delivery of the policy by a general agent, in spite of a stipulation in the application that the contract shall not take effect until the receipt and acceptance of the application at the company's general office,⁴ and where the person who delivered the policy did so with the apparent authority of a general agent the company is bound by his waiver of the condition as to payment of premium.⁵ Where the policy provided that the amount should be paid if the death of the insured should occur within ninety days after any accident from the effects thereof, the company is liable when the death occurs within the time limited though the assessments due within such period of ninety

¹ *Bail v. N. W. Mut. Acc. Assn.*, 56 Minn. 414; 57 N. W. R. 1063.

² *United States Mut. Acc. Assn. v. Mueller*, 151 Ill. 254; 37 N. E. R. 882. See also *ante*, § 380.

³ *Bushaw v. Woman's Mut. Acc. Ins. Co.*, 8 N. Y. Supp. 423; 28 N. Y. St. Rep. 524.

⁴ *Mathers v. Union Mut. Acc. Assn.*, 78 Wis. 588; 47 N. W. 1130.

⁵ *Standard Acc. Ins. Co. v. Friedenthal (Col.)*, 27 Pac. R. 88.

days have not been paid.¹ In the case cited the court says: "By failure to honor the assessment, he indeed ceased to be a member of the association, and could no longer look to the company for indemnity for accidental injury thereafter occurring; but by no term of the contract and by no provision of the by-laws does such cessation of membership work forfeiture of rights accrued, or release the company from legal liability incurred under the policy during the continuance of membership. The membership ceases; the legal liability for previous accidental injury remains. By one condition of the policy, it was competent for the association to cancel the certificate of membership at any time upon refunding paid unexpired assessments, or at the expiration of time covered by any one paid assessment. Can it be claimed that the association under this provision could, upon complying with its condition, absolve itself from liability for an accident occurring previous to such cancellation? We think not. Cessation of membership, whether voluntary or involuntary, operates prospectively, not in derogation of acquired rights or in release of antecedent liability. This view is impliedly sustained by that provision of the eighth by-law of the association above quoted, to the effect that a re-instated member shall not be entitled to indemnity for injuries occurring in the interval of time between default and re-instatement. It recognizes the liability of the association to respond for accidental injury sustained during the membership, notwithstanding subsequent severance or interruption of membership relation."

§ 505. Maturity of Contract—Notice and Proof of Loss.—The same rules govern accident insurance contracts, so far as notice and proofs of loss are concerned, as

¹ *Burkheiser v. Mut. Acc. Co.*, 10 C. C. A. 94; 61 Fed. R. 816; 26 L. R. A. 112.

in any other case. We have already referred to this subject,¹ and it is not necessary to again repeat what has been there said. In addition to those there cited it may be well to refer to a few additional cases. The defense of lack of due notice must be expressly averred in the answer if the fact of due notice is not alleged in the petition.² What is notice, under the terms of the policy, depends largely upon the terms of the contract. Generally where the policy requires notice to be given within a specified time, such a notice is a condition precedent to the recovery and must be given unless performance is impossible.³ It has been held that a non-compliance therewith was not excused by the intervention of death so sudden that the condition could not be complied with.⁴ But this is regarded as too strict an application of the rule. In a case decided by the Superior Court of New York,⁵ a large building, in which was placed the business of the assured, fell, and it was three days before it was learned by the recovery of his body that he had perished in the accident. It was held that a notice of death served eight days later, but eleven days after the accident, was sufficient although the contract provided that notice with full particulars of the accident and injury must be given within ten days after the injury or death. In this case the court said: "It is no doubt settled law that when the time within which notice of injury or death must be given is specified definitely it must be complied with, or no recovery can be had. Striking examples of this rule will be found in *Gamble v. Accident*

¹ *Ante*, § 403, *et seq.*

² *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226; 13 N. E. R. 604.

³ *United Benev. Soc. v. Freeman*, 111 Ga. 355; 36 S. E. R. 764.

⁴ *Gamble v. Accident Ass. Co.*, 4 Irish R. (C. L.) 204; *Martin v. Equitable Acc. Assn.*, 41 N. Y. St. Rep. 77; 16 N. Y. Supp. 279.

⁵ *Trippe v. Provident Fund Soc.*, 3 Misc. R. 445; 23 N. Y. Supp. 173.

Co.,¹ and *Patton v. Corporation*,² wherein it was held that the omission to give the notice within the prescribed time, even when death was instantaneously caused by an accident, was a complete answer to any claim made on the policy. Those were cases of accidental drowning, and are distinguishable from the present by the important feature that the fact of death was known immediately following the accident. Here it was absolutely unknown to any one until the finding of the body on August 25, 1891. No one could knowingly say that the death was instantaneous or exactly when or how it was occasioned except as one of the sequences of the accident. The facts respecting the accident and death being undisputed, the question of what construction should be given to the condition was one purely of law for the court. It would have been idle to have submitted to the jury for determination the question as to when the intestate died. No one knew how long he lived after the accident or when death ensued and to attempt to fix the period with precision would be nothing better than a guess or conundrum, which, as yet, is an insufficient foundation for a finding of fact. If there was any reasonable doubt as to the proper construction to be placed upon the condition, we would adopt a reasonable one consistent with justice,³ and if necessary apply the rule applicable to a deed poll, that the words shall be taken in their strict sense against the grantor, and liberally in favor of the other party.⁴ The court must give practical and reasonable effect to all parts of the contract; not only those affecting one party, but all parties. As the limitation of ten days tends to a forfeiture, which is not

¹ 4 Ir. Com. Law, 204.

² 20 L. R. Ir. 93.

³ Warren's Bl. Comm. (2d London Ed.) 505.

⁴ Bish Cont., § 600; 2 Pars. Cont. 506; Broom Leg. Max. 594; Jones Const. Com. Cont., § 228.

avored in law, it must not be shortened by construction to deprive the beneficiary of any of the time allowed by the contract for the protection of her rights. The policy of law is to maintain contracts and enforce rights thereunder when this can be done without offending the ascertained intention of the contracting parties or some legal principle." And where the accident resulted in concussion of the brain causing mental derangement it was held that during the time of such derangement notice was excused.¹ And where the insured died from the effects of the accident it was held that no claimant existed until an administrator was appointed.² And where the contract only provided for notice in case of disability it was held³ that notice was not required where the accident did not prevent the assured from his usual labor but afterwards resulted in death. Where performance of the condition is impossible, as where notice was required to be given within ten days after the accident and death did not occur until after the expiration of the ten days, it has been held⁴ that the condition is invalid and compliance therewith is excused. Slight circumstances, however, will amount to a waiver of this requirement. Thus, where, although the policy provided that failure to give the company notice of any injury within ten days should forfeit all claims under the policy, a month after the injury the plaintiff addressed a notice to the company,

¹ *Woodmen's Acc. Assn. v. Byers*, 62 Neb. 673; 87 N. W. R. 546; 55 L. R. A. 291. See also *Comstock v. Fraternal Acc. Assn.*, 116 Wis. 382; 93 N. W. R. 22; *Grant v. N. Am. Cas. Co.*, 88 Minn 397; 93 N. W. R. 312; *Hayes v. Continental Cas. Co.*, 98 Mo. App. 410; 72 S. W. R. 135.

² *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625; 45 N. E. R. 563; affg. 61 Ill. App. 140; see also *Peele v. Provident Sav. F. Soc.*, 147 Ind. 543; 44 N. E. R. 661; 46 N. E. R. 990; *Konrad v. Union Cas. Co.*, 49 La. Ann. 636; 21 Sou. R. 721.

³ *McFarland v. U. S. Mut. Acc. Ass.*, 124 Mo. 204; 27 S. W. R. 436.

⁴ *Hoffman v. Manufacturer's Acc. Ind. Co.*, 56 M. A. 301; *Oddfellows, etc., Assn. v. Earl*, 16 C. C. A. 596; 70 Fed. R. 16; 34 U. S. App. 285.

who received and kept it and afterwards a statement was made that the notice was sufficient, it was held that further notice was waived.¹ Where the contract provides that "immediate" notice must be given, reasonable notice is meant and this requirement will have a reasonable construction. It will generally be left to the jury to say whether under all the facts and circumstances, such notice was given within a reasonable time.² In a case in Pennsylvania,³ the policy provided that immediate written notice should be given of the accident; it was held that a notice mailed to the company October 1st, on a claim for the loss of an eye, resulting from an accident which occurred September 1st, was in time, it appearing that at the time of the accident the injury was not regarded as dangerous and plaintiff did not become convinced that he would lose his eye-sight until some time after sending such notice. In deciding the case the court said: "It is our duty to give the policy in question a fair, business-like, common-sense interpretation. It is in such sense that the parties to the contract probably understood it. The plaintiff was not claiming for weekly benefits. Had he done so there would have been more force in the defendant's position that he should have given notice of the

¹ *Brink v. Guaranty Mut. Acc. Assn.*, 7 N. Y. Supp. 847.

² *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; 18 S. W. R. 395; *McFarland v. U. S. Mut. Acc. Soc.*, 124 Mo. 204; 27 S. W. R. 436; *Brown v. Fraternal Acc. Assn.*, 18 Utah, 265; 55 Pac. R. 63; *Follis v. U. S. Mut. Acc. Assn.*, 94 Ia. 435; 28 L. R. A. 78; *Woodmen Acc. Assn. v. Byers*, 62 Neb. 673; 87 N. W. R. 546; 55 L. R. A. 291; *Travelers Ins. Co. v. Myers*, 62 Ohio St. 529; 57 N. E. R. 458; 49 L. R. A. 760; *Kentzler v. Am. Mut. Acc. Assn.*, 88 Wis. 589; 60 N. W. R. 1002; *Smith v. Travelers Ins. Co.*, 171 Mass. 357; 50 N. E. R. 516; *Foster v. Fidelity, etc., Co.*, 99 Wis. 447; 75 N. W. R. 69; 40 L. R. A. 833; *Cram v. Standard, etc., Co.*, 3 Ohio N. P. 318; *Pepper v. United Com. Tr. Assn. (Ky.)*, 69 S. W. R. 956; 24 Ky. L. R. 723. Under Maryland statute, see *Maryland Cas. Co. v. Hudgins (Tex.)*, 76 S. W. R. 745; reversing 72 S. W. R. 1047. See also *ante*, § 405.

³ *People's Mut. Acc. Assn. v. Smith*, 126 Pa. St. 317; 17 Atl. R. 605.

accident immediately after its occurrence on September 4th. His claim, however, was for the loss of his eye, and it is difficult to see how he could with any propriety make such a claim until he had actually lost it or it had become clear that he would lose it. How could he have truthfully made such a claim on the 5th of September? And had he done so and his eye-sight be restored, the probability is the defendant company would have criticised his claim even more closely than it has done now. In the case of *Lyon v. Assurance Co.*,¹ the insured was injured while traveling on a railway train. He brought suit to recover a weekly allowance. By the terms of the policy he was required to give 'immediate notice to the company at Hartford, Connecticut.' The injury was received on the 27th of September, and the notice was sent to the company at Hartford, on the 28th of October following, thirty-one days afterwards. During this time he was under medical treatment for eight or nine days at one place, when he returned to his home and came under treatment of the other physicians. The court held that under all the circumstances it was not error in the court below to refuse to instruct as a matter of law that the notice was not given in proper time. The question was left to be determined by the jury as one of fact. It is true the delay in such cases may be so great as to justify the court in ruling it as a question of law. There was no such delay in the case in hand, however. The word 'immediate' in the contract must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case; and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the court may rule it as a question of law. A person might be so injured as to be physically unable to give the notice for weeks. Hence, it

¹ 46 Iowa, 631.

is that such questions are referred to the jury, to say whether under all the circumstances, there has been an unreasonable delay in giving notice. In the present case we are not required to go so far as the court did in the Iowa case. I see no reason which requires notice to be given of the loss of an eye until the eye is destroyed, any more than that in the life policy a man should give notice of his death before he dies." The authorities all agree that the condition as to notice is a reasonable one, but should have a reasonable construction. The requirement of notice must be substantially complied with.¹ A company cannot demand requirements additional to those in the policy;² and the claimant is not bound to give notice until he has knowledge.³ A new injury requires new notice.⁴ The notice must give the cause of the accident;⁵ but need not state every detail;⁶ and assigning one cause for disability does not preclude the insured from showing other causes.⁷ The insured is bound by the statement, however, that he did not know the cause of the accident.⁸ After proofs are made claiming disability for a certain length of time no claim can afterwards be made for a

¹ *Brown v. Fraternal Acc. Assn.*, 18 Utah, 265; 55 Pac. Rep. 63; *Braymer v. Commercial Mut. Acc.*, 199 Pa. St. 259; 48 Atl. Rep. 972; *Western Travelers' Acc. Assn. v. Holbrook* (Neb.), 94 N. W. R. 816; *Ewing v. Commercial Travelers' Acc. Assn.*, 170 N. Y. 590; 63 N. E. R. 1116; affirming 55 App. Div. 241; 66 N. Y. Supp. 1056.

² *Braker v. Connecticut Indem. Assn.*, 27 App. Div. 234; 50 N. Y. Supp. 547.

³ *Mandell v. Fidelity, etc.*, 170 Mass. 173; 49 N. E. R. 110.

⁴ *Spicer v. Commercial Mut. Acc. Co.*, 16 Pa. Co. Ct. Rep. 163; 4 Pa. Dist. R. 271; *Western Com. Travellers' Assn. v. Smith*, 29 C. C. A. 223; 40 L. R. A. 653; 85 Fed. Rep. 401.

⁵ *Simons v. Iowa, etc., Assn.*, 102 Ia. 267; 71 N. W. R. 254.

⁶ *Kelly v. Metropolitan L. Ins. Co.*, 15 App. Div. 220; 44 N. Y. Supp. 179.

⁷ *Jarvis v. Northwestern Mut. R. Assn.*, 102 Wis. 546; 78 N. W. R. 1089.

⁸ *Mutual Acc. Assn. v. Simons*, 69 Ill. App. 94.

greater period;¹ nor for injury occurring subsequently to the time of making proofs.² A by-law limiting the time for notice does not apply to policies previously issued.³ Like other conditions those as to notice may be waived. When no notice has been given as required by the policy a denial of liability is no waiver.⁴ Furnishing blank forms for proofs, however, is a waiver of notice.⁵ The same principles apply in regard to waiver of notice as in other cases; and whether there has been a waiver or not depends upon the circumstances of each particular case.⁶

§ 505a. **Examination of Person or Body.** — Accident policies usually contain a provision that no claim shall be payable unless any medical adviser of the company shall be allowed to examine the person of the member in respect to any alleged injury, or cause of death, when, and so often as may be necessary or reasonably required, on behalf of the company. Concerning such a condition it has been said:⁷ “The design of this clause in the policy, was to enable the company to learn the exact cause of the death of the insured, as that cause might be shown by a post-mortem examination, if one should be held. What such an exami-

¹ *Travellers' Ins. Co. v. Thornton* (Ga.), 46 S. E. R. 678.

² *Clanton v. Travelers' Ins. Co.*, 101 Mo. App. 312; 74 S. W. R. 510; *Bickford v. Travelers' Ins. Co.*, 67 Vt. 418; 32 Atl. Rep. 230.

³ *Kimball v. Masons' Frat. Acc. Assn.*, 90 M. 183; 38 Atl. Rep. 102.

⁴ *Globe Acc. Ins. Co. v. Gerisch*, 61 Ill. App. 140; affirmed 163 Ill. 625; 45 N. E. R. 563.

⁵ *Crenshaw v. Pacific Mut. L. Ins. Co.*, 71 Mo. App. 42.

⁶ *National Masonic Assn. v. McBride* (Ind.), 70 N. E. R. 483; *Martin v. Manufacturers' Ins. Co.*, 151 N. Y. 94; 45 N. E. R. 377; *Peabody v. Fraternal Acc. Assn.*, 89 Me. 96; 35 Atl. Rep. 1020; *Pacific Mut. L. Ins. Co. v. Branham* (Ind. App.), 70 N. E. R. 174; *Metropolitan Acc. Assn. v. Froiland*, 161 Ill. 30; 43 N. E. R. 766; *Employers' etc., Corp. v. Rochelle*, 13 Tex. Civ. App. 232; 35 S. W. R. 869; *United Ben., etc., Assn., v. Freeman*, 111 Ga. 355; 36 S. E. R. 764; *Meech v. National Acc. Soc.*, 50 App. Div. 144; 63 N. Y. Supp. 1008.

⁷ *Loesch v. Union Cas., etc., Co.*, 176 Mo. 654; 75 S. W. R. 621.

nation might show the defendant was entitled to an opportunity to know. It is a reasonable requirement, under reasonable interpretation; and a violation of its terms under circumstances, showing disadvantage to the company, would work a forfeiture of the policy." But the demand for such an examination must be made within a reasonable time, and it will not do to wait until long after the body has been buried.¹ It has been held that the privilege of examining the body of the insured does not permit a dissection or an autopsy.²

§ 506. **Waiver and Estoppel.** — We have referred from time to time in the course of the discussion in this chapter to questions of waiver and estoppel in regard to particular requirements of the contract and have in a previous portion of this work discussed generally the subject. Reference therefore must be made to this prior discussion,³ and we therefore shall not consider the subject again.

§ 507. **Pleading, Evidence, etc.** — In the preceding chapter⁴ we have referred to some of the rules governing pleading and practice and evidence in actions on insurance contracts. The principles there referred to govern proceedings involving accident insurance policies, and we need not do more at this time than refer to a few additional cases where features peculiar to accident insurance were considered.⁵ The word, "fall,"

¹ American Employers' Liability Ins. Co. v. Barr, 16 C. C. A. 51; 68 Fed. Rep. 873; Root v. London, etc., Co. (App. Div.), 86 N. Y. Supp. 1055; Wehle v. United States Mut. Acc. Assn., 153 N. Y. 116; 47 N. E. R. 35; affirming 31 N. Y. Supp. 865; Ewing v. Commercial, etc., Assn., 55 App. Div. 241; 66 N. Y. Supp. 1056; affirmed 170 N. Y. 590; 63 N. E. R. 1116.

² Sudduth v. Travelers' Ins. Co., 106 Fed. Rep. 822.

³ See *ante*, Chapter XIV

⁴ *Ante*, § 440, *et seq.*

⁵ As to contents of petition Standard L. & A. I. Co. v. Koen, 11 Tex.

implies an accident.¹ A requirement in the policy that evidence of the injury causing the death shall be "direct and affirmative" cannot change the rules of evidence.² It has been held,³ that under a similar clause in a contract it does not require a claimant to show the fact of the injury and its attendant circumstances by eye-witnesses, the court saying: "It must be admitted that there was no evidence by any witnesses who saw the decedent when he was injured as to the particular manner in which his injury was caused. But the requirement of this certificate as to direct and positive proof did not make it necessary that the plaintiff should establish the fact and attendant circumstances of the decedent's injury by persons who were actually present when the injury occurred. The fact that the injury was caused by external violence was directly and positively established by the proof given of the nature and character of his injury." And the injury may be proved by circumstantial evidence alone.⁴ It is not error to charge the jury that it should not presume from the mere fact of death that the insured was murdered but they might draw such inferences as to the cause of death as under the rules of evidence the facts and circumstances justified.⁵ The burden of proof is on

Civ. A. 273; 33 S. W. R. 133; *Summers v. Aid Assn.* 84 Mo. App. 605; *Howe v. Pacific M. L. Ins. Co.*, 75 Mo. App. 63; *Railway Officials, etc., Assn. v. Armstrong*, 22 Ind. App. 406; 53 N. E. R. 1037; *Jones v. U. S. Mut. Acc. Assn.*, 92 I. 652; 61 N. W. R. 485; *Hester v. Fidelity, etc., Co.*, 69 Mo. App. 186; *Dailey v. Preferred, etc., Assn.*, 102 Mich. 299; 60 N. W. R. 694.

¹ *Richards v. Travelers Ins. Co. (S. D.)*, 100 N. W. R. 428.

² *Reynolds v. Equitable Acc. Assn.*, 49 Hun, 738; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751; 12 S. E. R. 18.

³ *Peck v. Equitable Acc. Assn.*, 52 Hun, 612; 5 N. Y. Supp. 215.

⁴ *Preferred Accident, etc., Co. v. Barker*, 35 C. C. A. 250; 93 Fed. R. 158. See also *Travellers Ins. Co. v. McConkey*, 127 U. S. 661; *Clark v. Employers, etc., Corp.*, 72 Vt. 458; 48 Atl. R. 639.

⁵ *Travellers Ins. Co. v. McConkey*, 127 U. S. 661.

the defendant to prove violation of any condition of the policy.¹ It is for the jury to say upon the facts whether the death is suicidal or accidental; the presumption of law being against suicide.² Where the beneficiary has no vested rights until the death of the insured the declarations made subsequent to the issuance of the certificate are admissible against the beneficiary in an action on such certificate.³ The burden of proof of an accidental death, or injury, is on the plaintiff; but, after such accident is shown, the burden is on the defendant to show that the injury was within one or more of the exceptions of the policy.⁴ And plaintiff must prove the accident, although suicide is pleaded by the defendant.⁵ We give in a note reference to a number of cases involving questions of evidence, not attempting at this time to discuss the subject further.⁶ The Texas law giving damages for refusal to

¹ *Badenfeld v. Mass. Mut. Acc. Assn.*, 154 Mass. 77; 27 N. E. R. 769; see also *ante*, § 469.

² *Washburn v. Nat. Acc. Soc.*, 32 N. Y. St. Rep. 34; 10 N. Y. Supp. 366; *McDonald v. Refuge Ass. Co.*, 27 Scottish L. R. 764; *Duncan v. Preferred Mut. Acc. Assn.*, 36 N. Y. St. Rep. 928; 13 N. Y. Supp. 620; see also *ante*, § 496.

³ *Steinhausen v. Preferred Mut. Acc. Assn.*, 36 N. Y. St. Rep. 70; 13 N. Y. Supp. 36; *ante*, § 460.

⁴ *Whitlach v. Fidelity & Casualty Co.*, 149 N. Y. 45; 43 N. E. R. 405; *Hess v. Preferred, etc., Assn.*, 112 Mich. 196; 70 N. W. R. 460; 40 L. R. A. 444; *Lampkin v. Travellers' Ins. Co.*, 11 Colo. App. 249; 52 Pac. Rep. 1040; *Follis v. United States Mut. Acc. Assn.*, 94 Ia. 435; 62 N. W. R. 807; 28 L. R. A. 78; *Meadows v. Pacific Mut. L. Ins. Co.*, 129 Mo. 76; 31 S. W. R. 578; *Anthony v. Mercantile Mut. Acc. Assn.*, 162 Miss. 354; 38 N. E. R. 973; 26 L. R. A. 406; *Jones v. United States Mut. Acc. Assn.*, 92 Ia. 652; 61 N. W. R. 485; *American Acc. Ins. Co. v. Carson*, 99 Ky. 441; 36 S. W. R. 169; 34 L. R. A. 301.

⁵ *Laessig v. Travelers' Protective Assn.*, 169 Mo. 72; 69 S. W. R. 469; *Hess v. Preferred, etc., Assn.*, *supra*.

⁶ Evidence of accidental death by drowning found sufficient. *Landon v. Preferred, etc., Assn.*, 43 App. Div. 487; 60 N. Y. Supp. 188; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119; 85 N. W. R. 459. Accidental in-

pay on insurance policy does not apply in actions on accident insurance policies.¹

juries. *Long v. Travelers' Ins. Co.*, 113 Ia. 259; 85 N. W. R. 24. As to circumstantial evidence, *Clark v. Employers', etc., Co.*, 72 Vt. 458; 48 Atl. Rep. 639. Generally, *Standard L. & A. Co. v. Thornton*, 40 C. C. A. 564; 100 Fed. Rep. 582; 49 L. R. A. 116; *Kling v. Masons' etc., Assn.*, 104 La. Ann. 763; 29 Sou. Rep. 332; *Stout v. Pacific Mut. L. Ins. Co.*, 130 Cal. 471; 62 Pa. 732; *Carpenter v. American Acc. Co.*, 46 S. C. 541; 24 S. E. R. 500; *Wehle v. United States Mut. Acc. Assn.*, 153 N. Y. 116; 47 N. E. R. 35; *Sharpe v. Commercial Travelers', etc., Assn.*, 139 Ind. 92; 37 N. E. R. 353; *Hall v. American Masonic, etc., Assn.*, 86 Wis. 518; 57 N. W. R. 366; *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121; 42 S. E. R. 287, 46 S. E. R. 678; *Stevens v. Continental Casualty Co. (N. D.)*, 97 N. W. R. 862; *National Mas. Acc. Assn. v. Shryock*, 20 C. C. A. 3; 36 U. S. App. 658; 73 Fed. Rep. 774; *Fidelity, etc., Co. v. Eickhoff*, 63 Minn. 170; 65 N. W. R. 351; 30 L. R. A. 586; *Chambers v. Northwestern M. L. Ins. Co.*, 64 Minn. 495; 67 N. W. R. 367; *Hale v. Life Ind. Co.*, 65 Minn. 548; 68 N. W. R. 182; *Mullen v. Mutual L. Ins. Co.*, 89 Tex. 259; 34 S. W. R. 605; *Ætna L. Ins. Co. v. Vandecar*, 80 Fed. Rep. 282.

¹ *Ætna L. Ins. Co. v. Barker*, 30 Tex. Civ. A. 521; 72 S. W. R. 166, 580, 621.

MORTALITY AND COMPOUND INTEREST AND DISCOUNT TABLES.

TABLE A. — Comparison of the Carlisle, Actuaries or 17 offices, American Experience and English, Life Tables in respect to number living and dying at certain ages from 1 to 100.

TABLE B. — Comparison of Northampton, Carlisle, Actuaries or 17 offices, American Experience, English Life, and 30 American Offices Tables, showing Expectancy of life by each at ages from 1 to 100.

NOTE. — For statement of origin, etc., of these various Mortality Tables, see note to § 22, *ante*.

TABLE C. — Compound Interest Table, showing the sum to which one dollar will amount to in a given number of years not exceeding forty, at a given rate of compound interest.

TABLE D. — Compound Interest Table, showing the sum to which one dollar per annum paid in advance at the beginning of each year will amount to in a given number of years not exceeding forty, at a given rate of compound interest.

TABLE E. — Compound Discount Table, showing the present value of one dollar to be received at the end of any number of years not exceeding forty, at a given rate of compound interest.

TABLE F. — Compound Discount Table, showing the present value of an annuity of one dollar per year payable at the end of each year for any number of years not exceeding forty, at a given rate of compound interest.

EXPLANATION OF SIGNS IN TABLE A.

x . denotes the age to which the statistics given in the same line apply.

l_x . denotes the number of persons living at the ages respectively given on the same line in the left hand column marked x .

d_x . denotes the number of deaths at the ages given respectively on the same line in the left hand corner marked x .

TABLES OF MORTALITY.

TABLE A.—COMPARISON OF DIFFERENT LIFE TABLES.

AGE.	Carlisle.		Actuaries or 17 Offices.	Am. 1858.	English Life Table No. 3.			
	l_x .	d_x .	l_x .	l_x .	Males, l_x .	d_x .	Fem. l_x .	d_x .
0	10,000	1,539			511,745	83,719	488,255	65,774
1	8,461	682			428,026	27,521	422,481	26,159
2	7,779	505			400,505	14,215	396,322	14,023
3	7,274	276			386,290	9,213	382,299	9,243
4	6,998	201			377,077	6,719	373,056	6,596
5	6,797	121			370,358	5,033	366,460	4,866
6	6,676	82			365,325	3,953	361,594	3,815
7	6,594	58			361,372	3,310	357,779	3,249
8	6,536	43			358,062	2,734	354,530	2,724
9	6,493	33			355,328	2,297	351,806	2,328
10	6,460	29	100,000	100,000	353,031	1,983	349,478	2,045
11	6,431	31	99,324	99,251	351,048	1,776	347,433	1,861
12	6,400	32	98,650	98,505	349,272	1,666	345,572	1,765
13	6,368	33	97,978	97,762	347,606	1,637	343,807	1,745
14	6,335	35	97,307	97,022	345,969	1,679	342,062	1,789
15	6,300	39	96,636	96,285	344,290	1,781	340,273	1,888
16	6,261	42	95,965	95,550	342,509	1,928	338,385	2,029
17	6,219	43	95,293	94,818	340,581	2,112	336,356	2,205
18	6,176	43	94,620	94,089	338,469	2,320	334,151	2,400
19	6,133	43	93,945	93,362	336,149	2,541	331,751	2,609
20	6,090	43	93,268	92,637	333,608	2,764	329,142	2,819
21	6,047	42	92,588	91,914	330,844	2,801	326,323	2,867
22	6,005	42	91,905	91,192	328,043	2,836	323,456	2,912
23	5,963	42	91,219	90,471	325,207	2,868	320,544	2,952
24	5,921	42	90,529	89,751	322,339	2,897	317,592	2,989
25	5,879	43	89,835	89,032	319,442	2,926	314,603	3,024
26	5,836	43	89,137	88,314	316,516	2,954	311,579	3,055
27	5,793	45	88,434	87,596	313,562	2,981	308,524	3,084
28	5,748	50	87,726	86,878	310,581	3,009	305,440	3,112
29	5,698	56	87,012	86,160	307,572	3,038	302,328	3,138
30	5,642	57	86,292	85,441	304,534	3,068	299,190	3,163
31	5,585	57	85,565	84,721	301,466	3,100	296,027	3,187
32	5,528	56	84,831	84,000	298,366	3,134	292,840	3,209
33	5,472	55	84,089	83,277	295,232	3,171	289,631	3,233
34	5,417	55	83,339	82,551	292,061	3,211	286,398	3,255
35	5,362	55	82,581	81,822	288,850	3,254	283,143	3,279
36	5,307	56	81,814	81,090	285,596	3,300	279,864	3,301
37	5,251	57	81,038	80,353	282,296	3,352	276,563	3,326
38	5,194	58	80,253	79,611	278,944	3,406	273,237	3,350
39	5,136	61	79,458	78,862	275,538	3,465	269,887	3,376
40	5,075	66	78,653	78,106	272,073	3,529	266,511	3,402
41	5,009	69	77,838	77,341	268,544	3,596	263,109	3,431
42	4,940	71	77,012	76,567	264,948	3,668	259,678	3,459
43	4,869	71	76,173	75,782	261,280	3,746	256,219	3,490
44	4,798	71	75,316	74,985	257,534	3,826	252,729	3,522
45	4,727	70	74,435	74,173	253,708	3,912	249,207	3,555
46	4,657	69	73,526	73,345	249,796	4,001	245,652	3,591
47	4,588	67	72,582	72,497	245,795	4,095	242,061	3,627
48	4,521	63	71,601	71,627	241,700	4,192	238,434	3,665
49	4,458	61	70,580	70,731	237,508	4,292	234,769	3,705

TABLES OF MORTALITY.

TABLE A.—COMPARISON OF DIFFERENT LIFE TABLES.—*Cont'd.*

AGE.	Carlisle.		Actuaries or 17 Offices. <i>l_x</i> .	Am. 1858. <i>l_x</i> .	English Life Table No. 3.			
	<i>l_x</i> .	<i>d_x</i> .			Males, <i>l_x</i> .	<i>d_x</i> .	Fem. <i>l_x</i> .	<i>d_x</i> .
50	4,397	59	69,517	69,804	233,216	4,395	231,064	3,746
51	4,338	62	68,409	68,842	228,821	4,626	227,318	3,788
52	4,276	65	67,253	67,841	224,195	4,758	223,530	3,832
53	4,211	68	66,046	66,797	219,437	4,885	219,698	3,876
54	4,143	70	64,785	65,706	214,552	5,013	215,822	4,246
55	4,073	73	63,469	64,563	209,539	5,144	211,576	4,439
56	4,000	76	62,094	63,364	204,395	5,281	207,137	4,628
57	3,924	82	60,658	62,104	199,114	5,428	202,509	4,817
58	3,842	93	59,161	60,779	193,686	5,584	197,692	5,009
59	3,749	106	57,600	59,385	188,102	5,752	192,683	5,206
60	3,643	122	55,973	57,917	182,350	5,929	187,477	5,409
61	3,521	126	54,275	56,371	176,421	6,118	182,068	5,619
62	3,395	127	52,505	54,743	170,303	6,314	176,449	5,835
63	3,268	125	50,661	53,030	163,989	6,515	170,614	6,057
64	3,143	125	48,744	51,230	157,474	6,720	164,557	6,282
65	3,018	124	46,754	49,341	150,754	6,921	158,275	6,509
66	2,894	123	44,693	47,361	143,833	7,115	151,766	6,731
67	2,771	123	42,565	45,291	136,718	7,297	145,055	6,947
68	2,648	123	40,374	43,133	129,421	7,458	138,088	7,149
69	2,525	124	38,128	40,890	121,963	7,593	130,939	7,332
70	2,401	124	35,837	38,569	114,370	7,695	123,607	7,489
71	2,277	134	33,510	36,178	106,675	7,756	116,118	7,613
72	2,143	146	31,159	33,730	98,919	7,770	108,505	7,698
73	1,997	156	28,797	31,243	91,149	7,733	100,807	7,736
74	1,841	166	26,439	28,738	83,416	7,639	93,071	7,724
75	1,675	160	24,100	26,237	75,777	7,483	85,347	7,653
76	1,515	156	21,797	23,761	68,294	7,268	77,694	7,521
77	1,359	146	19,548	21,330	61,026	6,990	70,173	7,329
78	1,213	132	17,369	18,961	54,036	6,655	62,844	7,071
79	1,081	128	15,277	16,670	47,381	6,266	55,773	6,755
80	953	116	13,290	14,474	41,115	5,832	49,018	6,382
81	837	112	11,424	12,383	35,283	5,361	42,636	5,959
82	725	102	9,694	10,419	29,922	4,862	36,677	5,496
83	623	94	8,112	8,603	25,060	4,349	31,181	5,003
84	529	84	6,685	6,955	20,711	3,834	26,178	4,490
85	445	78	5,417	5,485	16,877	3,328	21,688	3,972
86	367	71	4,306	4,193	13,549	2,840	17,716	3,458
87	296	64	3,348	3,079	10,709	2,384	14,258	2,962
88	232	51	2,537	2,146	8,325	1,965	11,296	2,494
89	181	39	1,864	1,402	6,360	1,590	8,802	2,063
90	142	37	1,319	847	4,770	1,260	6,739	1,673
91	105	30	892	462	3,510	979	5,066	1,331
92	75	21	570	216	2,531	744	3,735	1,037
93	54	14	339	79	1,787	553	2,698	790
94	40	10	184	21	1,234	401	1,908	588
95	30	7	89	3	833	285	1,320	428
96	23	5	37		548	196	892	304
97	18	4	13		352	132	588	210
98	14	3	4		220	86	378	142
99	11	2	I		134	55	236	92
100	9	2			79	33	144	59

Beyond 100 years: Carlisle, *l_x* 7, 5, 3, 1. English, No. 3, Males, *l_x* 46, 25, 14, 7, 4, 2, 1.
 " Females, *l_x* 35, 49, 27, 15, 8, 4, 2, 1.

TABLES OF MORTALITY.

TABLE B.—EXPECTATION OF LIFE BY VARIOUS TABLES—YEARS AND DECIMALS.

AGE. x.	North- ampton.	Carlisle.	Actuaries or 17 Offices	Am. 1858.	English Life, No. 3.		30 Am. Offices.	
					Males.	Females.	Males.	Females
0	25.18	38.72			39 91	41.85		
1	32.74	44.68			46.65	47.31		
2	37.79	47.55			48.83	49.40		
3	39.55	49.82			49.61	50.20		
4	40.58	50.76			49.81	50.43		
5	40.84	51.25			49.71	50.33		
6	41.07	51.17			49.39	50.00		
7	41.03	50.80			48.92	49.53		
8	40.79	50.24			48.37	48.98		
9	40.36	49.57			47.74	48.35		
10	39.78	48.82	48.36	48.72	47.05	47.67	49.99	48.05
11	39.14	48.04	47.68	48.08	46.31	46.95	49.32	47.21
12	38.49	47.27	47.01	47.45	45.54	46.20	48.64	46.40
13	37.83	46.51	46.33	46.80	44.76	45.44	47.95	45.64
14	37.17	45.75	45.64	46.16	43.97	44.66	47.26	44.91
15	36.51	45.00	44.96	45.50	43.18	43.90	46.57	44.19
16	35.85	44.27	44.27	44.85	42.40	43.14	45.88	43.48
17	35 20	43 57	43.58	44.19	41.64	42.40	45.18	42.79
18	34.58	42.87	42.88	43.53	40.90	41.67	44.48	42.12
19	33.99	42.17	42.19	42.87	40.17	40.97	43.78	41 46
20	33.43	41.46	41.49	42.20	39.48	40.29	43.07	40.82
21	32.90	40.75	40.79	41.53	38.80	39.63	42.36	40.19
22	32.39	40 04	40.09	40.85	38.13	38.98	41.65	39.56
23	31.88	39.31	39.39	40.17	37.46	38 33	40.93	38.96
24	31.36	38.59	38.68	39.49	36.79	37.68	40.21	38.38
25	30.85	37.86	37.98	38.81	36.12	37.04	39.49	37.80
26	30.33	37.14	37.27	38.12	35.44	36.39	38 77	37 23
27	29.82	36.41	36.56	37.43	34.77	35.75	38.04	36.66
28	29.30	35.69	35.86	36.73	34.10	35.10	37.31	36.08
29	28.79	35.00	35.15	36.03	33.43	34.46	36 58	35.49
30	28.27	34.34	34.43	35.33	32.76	33.81	35.85	34.89
31	27.76	33.68	33 72	34.63	32.09	33.17	35.12	34.29
32	27.24	33.03	33.01	33.92	31.42	32.53	34.38	33.69
33	26.72	32 36	32 30	33.21	30.74	31.88	33.65	33.06
34	26.20	31.68	31.58	32.50	30 07	31.23	32.91	32.42
35	25.68	31.00	30.87	31.78	29.40	30 59	32.17	31.78
36	25.16	30.32	30 15	31.07	28.73	29.94	31.43	31.13
37	24.64	29 64	29.44	30 35	28.06	29.29	30.70	30.47
38	24.12	28 96	28.72	29.62	27.39	28.64	29.96	29.81
39	23.60	28 28	28.00	28.90	26.72	27.99	29.22	29.16
40	23.08	27.61	27.28	28.18	26.06	27.34	28.48	28.48
41	22.56	26.97	26.56	27.45	25.39	26.69	27.75	27.82
42	22.04	26.34	25.84	26.72	24.73	26 03	27.01	27.15
43	21.54	25.71	25.12	26.00	24.07	25.38	26.28	26.45
44	21.03	25.09	24.40	25.27	23.41	24.72	25.55	25.74
45	20.52	24.46	23.69	24.54	22.76	24.06	24.82	25.02
46	20.02	23.82	22.97	23.81	22.11	23.40	24.09	24.30
47	19.51	23.17	22.27	23.08	21.46	22.74	23.38	23.57
48	19.00	22.50	21.56	22.36	20.82	22.08	22.66	22.83
49	18.49	21.81	20.87	21.63	20.17	21.42	21.95	22.08

TABLES OF MORTALITY.

TABLE B.—EXPECTATION OF LIFE BY VARIOUS TABLES—YEARS
AND DECIMALS—*Continued.*

AGE. x.	North- ampton.	Carlisle.	Actuaries or 17 Offices	Am. 1858.	English Life, No. 3.		30 Am. Offices.	
					Males.	Females.	Males.	Females
50	17.99	21.11	20.18	20.91	19.54	20.75	21.24	21.33
51	17.50	20.39	19.50	20.20	18.90	20.09	20.54	20.59
52	17.02	19.68	18.82	19.49	18.28	19.42	19.84	19.87
53	16.54	18.97	18.16	18.79	17.67	18.75	19.15	19.15
54	16.06	18.28	17.50	18.09	17.06	18.08	18.47	18.44
55	15.58	17.58	16.86	17.40	16.45	17.43	17.80	17.73
56	15.10	16.89	16.22	16.72	15.86	16.79	17.13	17.03
57	14.63	16.21	15.59	16.05	15.26	16.17	16.47	16.35
58	14.15	15.55	14.97	15.39	14.68	15.55	15.83	15.67
59	13.68	14.92	14.37	14.74	14.10	14.94	15.19	15.02
60	13.21	14.34	13.77	14.10	13.53	14.34	14.56	14.37
61	12.75	13.82	13.18	13.47	12.96	13.75	13.94	13.73
62	12.28	13.31	12.61	12.86	12.41	13.17	13.34	13.10
63	11.81	12.81	12.05	12.26	11.87	12.60	12.74	12.49
64	11.35	12.30	11.51	11.67	11.34	12.05	12.16	11.90
65	10.88	11.79	10.97	11.10	10.82	11.51	11.60	11.31
66	10.42	11.27	10.46	10.54	10.32	10.98	11.04	10.74
67	9.96	10.75	9.96	10.00	9.83	10.47	10.50	10.19
68	9.50	10.23	9.47	9.47	9.36	9.97	9.97	9.65
69	9.05	9.70	9.00	8.97	8.90	9.48	9.46	9.13
70	8.60	9.18	8.54	8.48	8.45	9.02	8.97	8.62
71	8.17	8.65	8.10	8.00	8.03	8.57	8.49	8.13
72	7.74	8.16	7.67	7.55	7.62	8.13	8.02	7.65
73	7.33	7.72	7.26	7.11	7.22	7.71	7.57	7.20
74	6.92	7.33	6.86	6.68	6.85	7.31	7.14	6.76
75	6.54	7.01	6.48	6.27	6.49	6.93	6.72	6.34
76	6.18	6.69	6.11	5.88	6.15	6.56	6.32	5.93
77	5.83	6.40	5.76	5.49	5.82	6.21	5.93	5.55
78	5.48	6.12	5.42	5.11	5.51	5.88	5.57	5.18
79	5.11	5.80	5.09	4.74	5.21	5.56	5.21	4.82
80	4.75	5.51	4.78	4.39	4.93	5.26	4.87	4.49
81	4.41	5.21	4.48	4.05	4.66	4.98	4.55	4.17
82	4.09	4.93	4.18	3.71	4.41	4.71	4.24	3.88
83	3.80	4.65	3.90	3.39	4.17	4.45	3.95	3.59
84	3.58	4.39	3.63	3.08	3.95	4.21	3.67	3.33
85	3.37	4.12	3.36	2.77	3.73	3.98	3.40	3.08
86	3.19	3.90	3.10	2.47	3.53	3.76	3.14	2.84
87	3.01	3.71	2.84	2.18	3.34	3.56	2.89	2.62
88	2.86	3.59	2.59	1.91	3.16	3.36	2.64	2.42
89	2.66	3.47	2.35	1.66	3.00	3.18	2.39	2.23
90	2.41	3.28	2.11	1.42	2.84	3.01	2.17	2.05
91	2.09	3.26	1.89	1.19	2.69	2.85	1.98	1.89
92	1.75	3.37	1.67	.98	2.55	2.70	1.81	1.73
93	1.37	3.48	1.47	.80	2.41	2.55	1.64	1.59
94	1.05	3.53	1.28	.64	2.29	2.42	1.49	1.46
95	.75	3.53	1.12	.50	2.17	2.29	1.34	1.34
96	.50	3.46	.99		2.06	2.17	1.18	1.23
97		3.28	.89		1.95	2.06	1.03	1.09
98		3.07	.75		1.85	1.96	.83	.93
99		2.77	.50		1.76	1.86	.50	.50
100		2.28			1.68	1.76		

COMPOUND INTEREST TABLE.

TABLE C.—COMPOUND INTEREST TABLE.

ONE DOLLAR PRINCIPAL.

The sum to which One Dollar principal will increase, at compound interest, in any number of years not exceeding Forty, at 3, 4, 4½, 5, 5½, 6, 6½, and 7 per cent. per annum.

Years.	3 Per Cent.	4 Per Cent.	4½ Per Cent.	5 Per Cent.	5½ Per Cent.	6 Per Cent.	6½ Per Cent.	7 Per Cent.	Years.
1	1.030	1.040	1.045	1.050	1.055	1.060	1.065	1.070	1
2	1.061	1.082	1.092	1.103	1.113	1.124	1.134	1.145	2
3	1.093	1.125	1.141	1.158	1.174	1.191	1.208	1.225	3
4	1.126	1.170	1.193	1.216	1.239	1.262	1.286	1.311	4
5	1.159	1.217	1.246	1.276	1.307	1.338	1.370	1.403	5
6	1.194	1.265	1.302	1.340	1.379	1.419	1.459	1.501	6
7	1.230	1.316	1.361	1.407	1.455	1.504	1.554	1.606	7
8	1.267	1.369	1.422	1.477	1.535	1.594	1.655	1.718	8
9	1.305	1.423	1.486	1.551	1.619	1.689	1.763	1.838	9
10	1.344	1.480	1.553	1.629	1.708	1.791	1.877	1.967	10
11	1.384	1.539	1.623	1.710	1.802	1.898	1.999	2.105	11
12	1.426	1.601	1.696	1.796	1.901	2.012	2.129	2.252	12
13	1.469	1.665	1.772	1.886	2.006	2.133	2.267	2.410	13
14	1.513	1.732	1.852	1.980	2.116	2.261	2.415	2.579	14
15	1.558	1.801	1.935	2.079	2.232	2.397	2.572	2.759	15
16	1.605	1.873	2.022	2.183	2.355	2.540	2.739	2.952	16
17	1.653	1.948	2.113	2.292	2.485	2.693	2.917	3.159	17
18	1.702	2.026	2.208	2.407	2.621	2.854	3.107	3.380	18
19	1.754	2.107	2.308	2.527	2.766	3.026	3.309	3.617	19
20	1.806	2.191	2.412	2.653	2.918	3.207	3.524	3.870	20
21	1.860	2.279	2.520	2.786	3.078	3.400	3.753	4.141	21
22	1.916	2.370	2.634	2.925	3.248	3.604	3.997	4.430	22
23	1.974	2.465	2.752	3.072	3.426	3.820	4.256	4.741	23
24	2.033	2.563	2.876	3.225	3.615	4.049	4.533	5.072	24
25	2.094	2.666	3.005	3.386	3.813	4.292	4.828	5.427	25
26	2.157	2.772	3.141	3.556	4.023	4.549	5.141	5.807	26
27	2.221	2.883	3.282	3.733	4.244	4.822	5.476	6.214	27
28	2.288	2.999	3.430	3.920	4.478	5.112	5.832	6.649	28
29	2.357	3.119	3.584	4.116	4.724	5.418	6.211	7.114	29
30	2.427	3.243	3.745	4.322	4.984	5.743	6.614	7.612	30
31	2.500	3.373	3.914	4.538	5.258	6.088	7.044	8.145	31
32	2.575	3.508	4.090	4.765	5.547	6.453	7.502	8.715	32
33	2.652	3.648	4.274	5.003	5.852	6.841	7.990	9.325	33
34	2.732	3.794	4.466	5.253	6.174	7.251	8.509	9.978	34
35	2.814	3.946	4.667	5.516	6.514	7.686	9.062	10.677	35
36	2.898	4.104	4.877	5.792	6.872	8.147	9.651	11.424	36
37	2.985	4.268	5.097	6.081	7.250	8.636	10.279	12.224	37
38	3.075	4.439	5.326	6.385	7.649	9.154	10.947	13.079	38
39	3.167	4.616	5.566	6.705	8.069	9.704	11.658	13.995	39
40	3.262	4.801	5.816	7.040	8.513	10.286	12.416	14.974	40

To find the sum to which a given amount will increase, at compound interest, at any of the rates per cent. and number of years expressed in the above Table:

Multiply the given amount by the sum to which one dollar will increase at the rate and for the number of years required, marking off as many decimals from the product as there are decimals in the multiplier and multiplicand.

COMPOUND INTEREST TABLE.

TABLE D.—COMPOUND INTEREST TABLE.

ONE DOLLAR PER ANNUM IN ADVANCE.

The sum to which One Dollar per Annum, paid at the beginning of each year, will increase, at compound interest, in any number of years not exceeding Forty, at 3, 4, 4½, 5, 5½, 6, 6½, and 7 per cent per annum.

Years.	3 Per Cent.	4 Per Cent.	4½ Per Cent.	5 Per Cent.	5½ Per Cent.	6 Per Cent.	6½ Per Cent.	7 Per Cent.	Years.
1	1.030	1.040	1.045	1.050	1.055	1.060	1.065	1.070	1
2	2.091	2.122	2.137	2.153	2.168	2.184	2.199	2.215	2
3	3.184	3.246	3.278	3.310	3.342	3.375	3.407	3.440	3
4	4.309	4.416	4.471	4.526	4.581	4.637	4.694	4.751	4
5	5.468	5.633	5.717	5.802	5.888	5.975	6.064	6.153	5
6	6.662	6.898	7.019	7.142	7.267	7.394	7.523	7.654	6
7	7.892	8.214	8.380	8.549	8.722	8.897	9.077	9.260	7
8	9.159	9.583	9.802	10.027	10.256	10.491	10.732	10.978	8
9	10.464	11.006	11.288	11.578	11.875	12.181	12.494	12.816	9
10	11.808	12.486	12.841	13.207	13.583	13.972	14.371	14.784	10
11	13.192	14.026	14.464	14.917	15.385	15.870	16.371	16.888	11
12	14.618	15.627	16.160	16.713	17.287	17.882	18.500	19.141	12
13	16.086	17.292	17.932	18.599	19.292	20.015	20.768	21.550	13
14	17.599	19.024	19.784	20.579	21.409	22.276	23.182	24.129	14
15	19.157	20.825	21.719	22.657	23.641	24.673	25.754	26.888	15
16	20.762	22.698	23.742	24.840	25.996	27.213	28.493	29.840	16
17	22.414	24.645	25.855	27.132	28.481	29.906	31.410	32.999	17
18	24.117	26.671	28.064	29.539	31.103	32.760	34.517	36.379	18
19	25.870	28.778	30.371	32.066	33.868	35.786	37.825	39.995	19
20	27.676	30.969	32.783	34.719	36.786	38.993	41.350	43.865	20
21	29.537	33.248	35.303	37.505	39.864	42.392	45.102	48.006	21
22	31.453	35.618	37.937	40.430	43.112	45.996	49.098	52.436	22
23	33.426	38.083	40.689	43.502	46.538	49.816	53.355	57.177	23
24	35.459	40.646	43.565	46.727	50.153	53.865	57.888	62.249	24
25	37.553	43.312	46.571	50.113	53.966	58.156	62.715	67.676	25
26	39.710	46.084	49.711	53.669	57.989	62.706	67.857	73.484	26
27	41.931	48.968	52.993	57.403	62.233	67.528	73.333	79.698	27
28	44.219	51.966	56.423	61.323	66.711	72.640	79.164	86.347	28
29	46.575	55.085	60.007	65.439	71.435	78.058	85.375	93.461	29
30	49.003	58.328	63.752	69.761	76.419	83.802	91.989	101.073	30
31	51.503	61.701	67.666	74.299	81.677	89.890	99.034	109.218	31
32	54.078	65.210	71.756	79.064	87.225	96.343	106.536	117.933	32
33	56.730	68.858	76.080	84.067	93.077	103.184	114.526	127.259	33
34	59.462	72.652	80.497	89.320	99.251	110.435	123.035	137.237	34
35	62.276	76.598	85.164	94.836	105.765	118.121	132.097	147.913	35
36	65.174	80.702	90.041	100.628	112.637	126.268	141.748	159.337	36
37	68.159	84.970	95.138	106.710	119.887	134.904	152.027	171.561	37
38	71.234	89.409	100.464	113.095	127.536	144.058	162.974	184.640	38
39	74.401	94.026	106.030	119.800	135.606	153.762	174.632	198.635	39
40	77.663	98.827	111.847	126.840	144.119	164.048	187.048	213.610	40

To find the sum to which a given amount *per annum* will increase, at compound interest, at any of the rates per cent and number of years expressed in the above Table:

Multiply the given amount per annum, by the sum to which one dollar per annum will increase at the rate and for the number of years required, marking off as many decimals from the product as there are decimals in the multiplier and multiplicand.

COMPOUND DISCOUNT TABLE.

TABLE E.—COMPOUND DISCOUNT TABLE.

ONE DOLLAR PRINCIPAL.

The present value of One Dollar to be received at the end of any number of years, not exceeding Forty, discounting at the rates of 3, 4, 4½, 5, 5½, 6, 6½, and 7 per cent. compound interest.

Years.	3 Per Cent.	4 Per Cent.	4½ Per Cent.	5 Per Cent.	5½ Per Cent.	6 Per Cent.	6½ Per Cent.	7 Per Cent.	Years.
1	.9709	.9615	.9569	.9524	.9479	.9434	.9390	.9346	1
2	.9426	.9246	.9157	.9070	.8984	.8900	.8817	.8734	2
3	.9151	.8890	.8763	.8638	.8516	.8396	.8278	.8163	3
4	.8885	.8548	.8386	.8227	.8072	.7921	.7773	.7629	4
5	.8626	.8219	.8025	.7835	.7651	.7473	.7299	.7130	5
6	.8375	.7903	.7679	.7462	.7252	.7050	.6853	.6663	6
7	.8131	.7599	.7348	.7107	.6874	.6651	.6435	.6227	7
8	.7894	.7307	.7032	.6768	.6516	.6274	.6042	.5820	8
9	.7664	.7026	.6729	.6446	.6176	.5919	.5673	.5439	9
10	.7441	.6756	.6439	.6139	.5854	.5584	.5327	.5083	10
11	.7224	.6496	.6162	.5847	.5549	.5268	.5002	.4751	11
12	.7014	.6246	.5897	.5568	.5260	.4970	.4697	.4440	12
13	.6810	.6006	.5643	.5303	.4986	.4688	.4410	.4150	13
14	.6611	.5775	.5400	.5051	.4726	.4423	.4141	.3878	14
15	.6419	.5553	.5167	.4810	.4479	.4173	.3888	.3624	15
16	.6232	.5339	.4945	.4581	.4246	.3936	.3651	.3387	16
17	.6050	.5134	.4732	.4363	.4024	.3714	.3428	.3166	17
18	.5874	.4936	.4528	.4155	.3815	.3503	.3219	.2959	18
19	.5703	.4746	.4333	.3957	.3616	.3305	.3022	.2765	19
20	.5537	.4564	.4146	.3769	.3427	.3118	.2838	.2584	20
21	.5375	.4388	.3968	.3589	.3249	.2942	.2665	.2415	21
22	.5219	.4220	.3797	.3418	.3079	.2775	.2502	.2257	22
23	.5067	.4057	.3633	.3256	.2919	.2618	.2349	.2109	23
24	.4919	.3901	.3477	.3101	.2767	.2470	.2206	.1971	24
25	.4776	.3751	.3327	.2953	.2622	.2330	.2071	.1842	25
26	.4637	.3607	.3184	.2812	.2486	.2198	.1945	.1722	26
27	.4502	.3468	.3047	.2678	.2356	.2074	.1826	.1609	27
28	.4371	.3335	.2916	.2551	.2233	.1956	.1715	.1504	28
29	.4243	.3207	.2790	.2429	.2117	.1846	.1610	.1406	29
30	.4120	.3083	.2670	.2314	.2006	.1741	.1512	.1314	30
31	.4000	.2965	.2555	.2204	.1902	.1643	.1420	.1228	31
32	.3883	.2851	.2445	.2099	.1803	.1550	.1333	.1147	32
33	.3770	.2741	.2340	.1999	.1709	.1462	.1252	.1072	33
34	.3660	.2636	.2239	.1904	.1620	.1379	.1175	.1002	34
35	.3554	.2534	.2143	.1813	.1535	.1301	.1103	.0937	35
36	.3450	.2437	.2050	.1727	.1455	.1227	.1036	.0875	36
37	.3350	.2343	.1962	.1644	.1379	.1158	.0973	.0818	37
38	.3252	.2253	.1877	.1566	.1307	.1092	.0913	.0765	38
39	.3158	.2166	.1797	.1491	.1239	.1031	.0858	.0715	39
40	.3066	.2083	.1719	.1420	.1175	.0972	.0805	.0668	40

To find the present value of a given amount to be received at the end of any number of years not exceeding forty, at any of the rates of compound discount expressed in the above Table:

Multiply the given amount by the present value of one dollar at the rate and for the number of years required, marking off as many decimals from the product as there are decimals in the multiplier and multiplicand.

COMPOUND DISCOUNT TABLE.

TABLE F.—COMPOUND DISCOUNT TABLE.

ONE DOLLAR PER ANNUM.

The present value of an Annuity of One Dollar (Annuity payable at the end of each year), for any number of years, not exceeding Forty, discounting at the rates of 3, 4, 4½, 5, 5½, 6, 6½, and 7 per cent compound interest.

Years.	3 Per Cent.	4 Per Cent.	4½ Per Cent.	5 Per Cent.	5½ Per Cent.	6 Per Cent.	6½ Per Cent.	7 Per Cent.	Years.
1	.971	.962	.957	.952	.948	.943	.939	.935	1
2	1 913	1.886	1.873	1 859	1.846	1.833	1.821	1.808	2
3	2.829	2.775	2.749	2 723	2.698	2.673	2.648	2.624	3
4	3 717	3.630	3 588	3.546	3.505	3.465	3.426	3.387	4
5	4.580	4.452	4.390	4.329	4.270	4.212	4.156	4.100	5
6	5.417	5.242	5.158	5.076	4.996	4.917	4.841	4.767	6
7	6 230	6.002	5.893	5 786	5.683	5.582	5.485	5.389	7
8	7 020	6.733	6 596	6.463	6.335	6.210	6.089	5.971	8
9	7.786	7.435	7.269	7.108	6.952	6 802	6.656	6.515	9
10	8.530	8.111	7.913	7.722	7.538	7.360	7.189	7.024	10
11	9.253	8 760	8.529	8.306	8.093	7 887	7.689	7.499	11
12	9.954	9.385	9.119	8.863	8.619	8 384	8.159	7.943	12
13	10 635	9.986	9.683	9.394	9 117	8.853	8 600	8.358	13
14	11 296	10.563	10 223	9.899	9 590	9 295	9.014	8.745	14
15	11.938	11.118	10.740	10.360	10.038	9 712	9 403	9.108	15
16	12.561	11.652	11.234	10.838	10 462	10.106	9.768	9.447	16
17	13 166	12.166	11.707	11.274	10.865	10.477	10.111	9.763	17
18	13 754	12 659	12.160	11.690	11.246	10.828	10.432	10.059	18
19	14.324	13.134	12.593	12 085	11.608	11.158	10.735	10.336	19
20	14.877	13.590	13.008	12.462	11.950	11.470	11.019	10.594	20
21	15 415	14.029	13.405	12.821	12.275	11.764	11 285	10.836	21
22	15.937	14.451	13.784	13.163	12.583	12.042	11.535	11.061	22
23	16.444	14.857	14.148	13.489	12.875	12.303	11.770	11.272	23
24	16.936	15.247	14.495	13.799	13.152	12 550	11 991	11.469	24
25	17.413	15.622	14.828	14.094	13.414	12.783	12.198	11.654	25
26	17.877	15.983	15 147	14.375	13.662	13 003	12.392	11.826	26
27	18.327	16.330	15.451	14.643	13.898	13.210	12.575	11.987	27
28	18.764	16.663	15.743	14.898	14.121	13.406	12.746	12.137	28
29	19.188	16.984	16.022	15.141	14.333	13.591	12.907	12.278	29
30	19.600	17.292	16.289	15.372	14.534	13.765	13.059	12.409	30
31	20.000	17.588	16 544	15.593	14.724	13.929	13.201	12.532	31
32	20.389	17.874	16.789	15.803	14.904	14.084	13.334	12.647	32
33	20.766	18.148	17.023	16.003	15.075	14.230	13.459	12.754	33
34	21.132	18 411	17.247	16 193	15.237	14.368	13.577	12.854	34
35	21.487	18.665	17.461	16 374	15.391	14.498	13.687	12.948	35
36	21.832	18.908	17.666	16.547	15.536	14.621	13.791	13.035	36
37	22.167	19.143	17.862	16.711	15.674	14.737	13.888	13.117	37
38	22.492	19.368	18.050	16.868	15.805	14.846	13.979	13.193	38
39	22.808	19.584	18.230	17.017	15.929	14.949	14.065	13.265	39
40	23.115	19.793	18.402	17 159	16.046	15.046	14.146	13.332	40

To find the present value of a given amount to be received at the end of each year during any number of years not exceeding forty, at any of the rates of compound discount expressed in the above Table:

Multiply the given sum to be received at the end of each year by the present value of One Dollar per annum, at the rate and for the number of years required, marking off as many decimals from the product as there are decimals in the multiplier and multiplicand.

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